TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 136.

W. H. ANSLEY, M. H. GLEASON, AND R. O. EDMONDS, APPELLANTS,

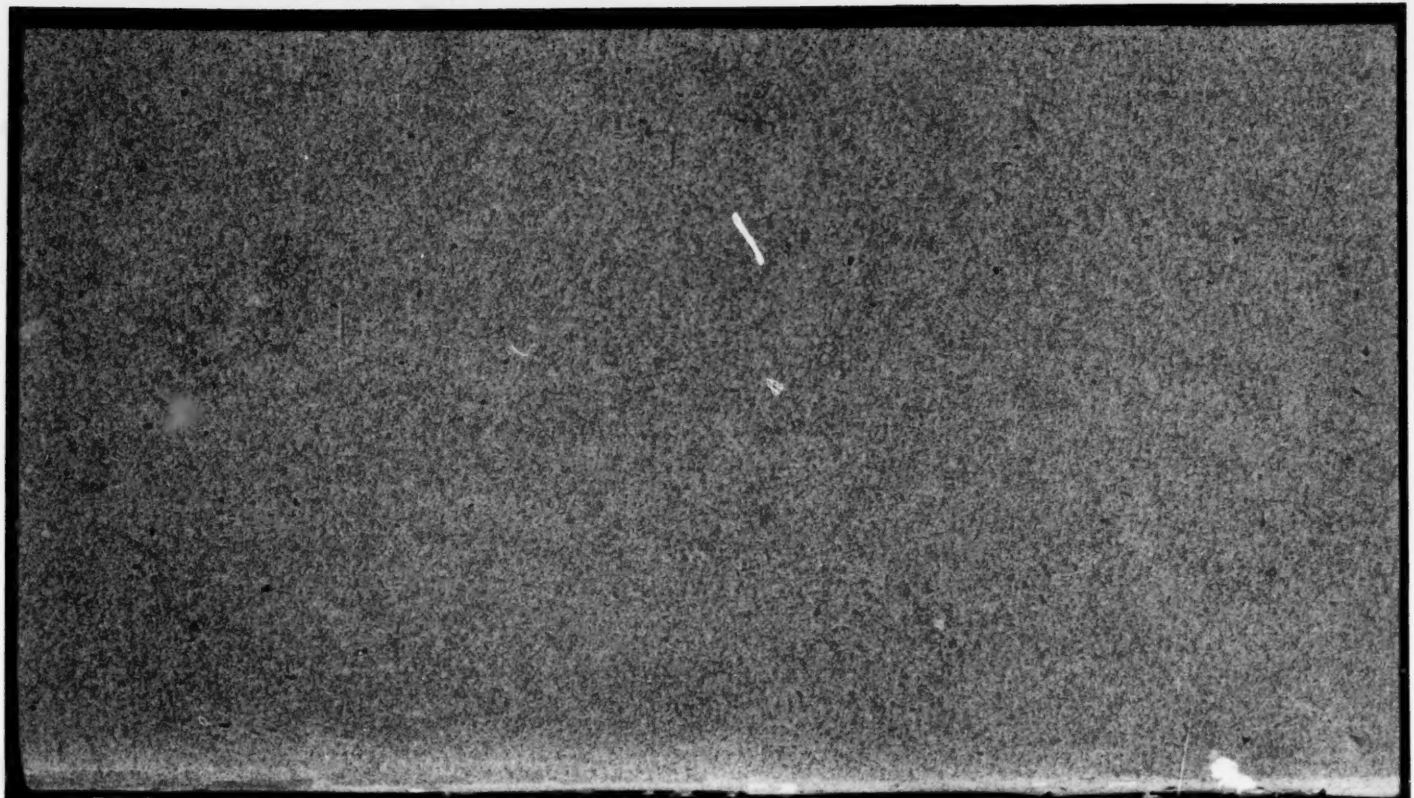
vs.

N. B. AINSWORTH, L. C. BURRISS, C. E. WOODS, JAMES ELLIOTT, AND THE OLA COAL AND MINING COMPANY.

APPEAL FROM THE UNITED STATES COURT IN THE INDIAN TERRITORY.

FILED SEPTEMBER 30, 1899.

(17,518.)



(17,518.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 404.

W. H. ANSLEY, M. H. GLEASON, AND R. O. EDMONDS, APPELLANTS,

vs.

N. B. AINSWORTH, L. C. BURRISS, O. E. WOODS, JAMES ELLIOTT, AND THE OLA COAL AND MINING COMPANY.

APPEAL FROM THE UNITED STATES COURT IN THE INDIAN TERRITORY.

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1 UNITED STATES OF AMERICA, } ss:
Indian Territory, Central Judicial District, }

Pleas in the United States court for the central district of the Indian Territory, at South McAlester, I. T., in the cause numbered upon the equity docket 2224 and entitled W. H. Ansley *et al.*, plaintiffs, *vs.* N. B. Ainsworth *et al.*, defendants, wherein W. H. Ansley, M. H. Gleason, and R. O. Edmonds are plaintiffs and N. B. Ainsworth, L. C. Burriss, O. E. Woods, James Elliott, and the Ola Coal & Mining Company are defendants.

Before the Honorable W. H. H. Clayton, judge of said court.

On the 31st day of March, 1899, there was filed in the office of the clerk of said court, at South McAlester, the amended complaint of the plaintiffs, which is in words and figures as follows, to wit:

In the United States Court in and for the Central District of the Indian Territory, Held at South McAlester.

W. H. ANSLEY ET AL., Plaintiffs,
vs.
N. B. AINSWORTH ET AL., Defendants. } No. 2224. Suit in Equity.

Amended Complaint.

By leave of the court first had, plaintiffs in the above numbered and entitled cause file this their amended complaint so that the same shall read as follows:

2 Now come W. H. Ansley, M. H. Gleason, and R. O. Edmonds, hereinafter styled plaintiffs, and, complaining of N. B. Ainsworth, L. C. Burriss, O. E. Woods, James Elliott, and the Ola Coal & Mining Company, represent:

That the plaintiffs W. H. Ansley is by blood a member and citizen of the Choctaw nation of Indians, recognized and accepted as such by the constituted authorities thereof, and now resident at McAlester, in said Choctaw nation; that the plaintiffs M. H. Gleason and R. O. Edmonds are citizens of the United States by birth, who, by intermarriage with members of the Choctaw nation, solemnized on the part of the said M. H. Gleason on the 22nd day of January, 1871, and on the part of the said R. O. Edmonds on the 16th day of July, 1870, in form and manner as required by the laws of the Choctaw nation, became on said dates citizens of the Choctaw nation, and by virtue of provisions of treaties by said nation made with the United States, hereinafter set out, and of the laws of said nation, entitled to all the rights, privileges, benefits, and immunities of citizens of said nation under the laws thereof in anywise belonging or appertaining, and that both said plaintiffs have since said dates been recognized and accepted by the constituted authorities of said nation as members and citizens thereof, and have since said dates continu-

ously resided in said nation, and that said plaintiffs now reside at Wilburton, in said nation.

That the defendant N. B. Ainsworth is a citizen of said nation, resident at McAlester, Indian Territory, and the defendant L. C. Burriss is a citizen of the Chickasaw nation, resident at Tishomingo, in said nation; that the defendant O. E. Woods is a citizen of the United States, resident at Wilburton, in the Choctaw nation; that the defendant James Elliott is a citizen of the United States, resident at Krebs, in said Choctaw nation, and that the Olo Coal & Mining Company is a corporation organized under the laws
3 of Kansas, engaged in operating a mine in said Choctaw nation, at Wilburton, I. T., and having its offices and agents at said point, the defendant James Elliott being president thereof and the defendant O. E. Woods general manager; that the defendants Ainsworth and Elliott reside nearer to the town of South McAlester than they do to any other point at which a United States court is held in the central district of the Indian Territory.

1.

Plaintiffs aver that under and by virtue of article 2 of the treaty executed between the United States of America and the Choctaw nation of Indians on October 18, 1820, the United States, in consideration of the cession to it by the Choctaw nation of certain of their lands east of the Mississippi, described in said treaty, ceded to said nation the tract of country west of the Mississippi river situated between the Arkansas and Red rivers and bounded as follows:

"Beginning on the Arkansas river, where the lower boundary line of the Cherokees strikes the same, thence up the Arkansas to the Canadian fork and up the same to its source, thence due south to the Red river, thence down Red river three miles below the mouth of Little river which empties itself into Red river on the north side, thence a direct line to the beginning."

That by article 2 of the treaty executed between the United States and the Choctaw nation of Indians on September 27, 1830, it was provided:

"That the United States under a grant specially to be made by the President of the United States, shall cause to be conveyed to the Choctaw nation a tract of country west of the Mississippi river, in fee-simple to them and their descendants, to inure to them while they shall exist as a nation and live on it, beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas river, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits, thence due south to Red river, and down Red river to the west boundary of the Territory of Arkansas, thence north along that line to the beginning, the boundary of the same to be agreeably to the treaty made and concluded at Washington city in the year 1825, the grant to be executed as soon as the present treaty shall be ratified."

4 That by article 4 of said treaty it was agreed and provided as follows:

"The Government and people of the United States are hereby

obliged to secure to the said Choctaw nation of red people the jurisdiction and government of all persons and property that may be within their limits west, so that no State or Territory shall ever have a right to pass laws for the government of the Choctaw nation of red people and their descendants, and that no part of the land granted them shall ever be embraced in any Territory or State, but the United States shall forever secure said Choctaw nation from and against all laws except such as from time to time may be enacted in their own national council not inconsistent with the Constitution, treaties and laws of the United States, and except such as may and which have been enacted by Congress to the extent that Congress, under the Constitution, are required to exercise legislation over Indian affairs, but the Choctaws, should this treaty be ratified, express a wish that Congress may grant to the Choctaws the right of punishing by their own laws any white man who shall come into their nation and infringe any of their national regulations."

That by article 12 of said treaty it was agreed and provided, among other things:

"All intruders shall be removed from the Choctaw nation and kept without it. Private property to be always respected, and on no occasion taken for public purposes without just compensation being made therefor to the rightful owner."

That by the first article of a convention and agreement made on January 17, 1837, between the Choctaw tribe of red people and the Chickasaw tribe of Indians it was provided:

"It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country, to be held on the same terms that the Choctaws now hold it, except the right of disposing of it (which is held in common with the Choctaws and Chickasaws) to be called the Chickasaw district of the Choctaw nation; to have an equal representation in their general council, and to be placed on an equal footing in every other respect with any of the other districts of said nation, except, a voice in the management of the consideration which is given for these rights and privileges; and the Chickasaw people to be entitled to all the rights and privileges of Choctaws, with the exception of participating in the Choctaw annuities and the consideration to be paid for these rights and privileges, and to be subject to the same laws to which the Choctaws are; but the Chickasaws reserve to themselves the sole right and privilege of controlling and managing the residue of their funds so far as is consistent with the late treaty between the said people and the Government of the United States, and of making such regulations and electing officers for that purpose as they may think proper."

That by article 2 of said convention and agreement it was provided as follows:

"The Chickasaw district shall be bounded as follows, viz: Beginning on the north bank of Red river at the mouth of Island bayou about eight or ten miles below the mouth of False Washita, thence running north along the main channel of said bayou to its source; thence along the dividing ridge between the

Washita and Low Blue rivers to the road leading from Fort Gibson to Fort Washita; thence along said road to the line dividing Mosholatubbee and Pushmataha districts; thence eastwardly along said district line to the source of Brushy creek, thence down said creek to where it flows into the Canadian river, ten or twelve miles above the mouth of the South fork of the Canadian; thence west along the main Canadian river to its source, if in the limits of the United States, or to those limits; and thence due south to Red river, and down Red river to the beginning."

That by a patent executed by the President of the United States on March 23rd, 1842, conveyance was made to the Choctaw nation of the lands described in the second article of the treaty of 1830, above set out, in terms contained in the conveying clause, as follows:

"Now know ye, that the United States of America, in consideration of the premises and in execution of the agreement and stipulation in the aforesaid treaty, have given and granted and by these presents do give and grant unto the said Choctaw nation the aforesaid tract of country west of the Mississippi, to have and to hold the same, with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, as intended to be conveyed by the aforesaid article, in fee-simple to them and their descendants to inure to them while they shall exist as a nation and live on it, liable to no transfer or alienation except to the United States or with their consent."

That in the preliminary clause of the treaty of 1855, made and executed between the United States and the Choctaw and Chickasaw tribes of Indians, it was recited that the political connection theretofore existing between the Choctaw and Chickasaw tribes of Indians had given rise to unhappy and injurious dissensions and controversies among them, which rendered necessary a readjustment of their relations to each other and to the United States, and by article 2 of said treaty it was provided as follows:

"The following shall constitute and remain the boundaries of the Choctaw and Chickasaw country; namely; beginning at a point on the Arkansas river one hundred paces east of old Fort Smith, where the western boundary line of the State of Arkansas crosses the said river, and running thence south to Red river, thence up Red river to the point where the meridian of one hundred degrees west longitude crosses the same; thence north and along said meridian to the main Canadian river; thence down said
6 river to its junction with the Arkansas river; thence down said river to the place of beginning."

"And pursuant to the act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common, so that each and every member of either tribe shall have an equal undivided interest in the whole, provided, however, no part thereof shall ever be sold without the consent of both tribes, and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same."

That by article 2 of said treaty a district for the Chickasaws was established and the boundaries thereof fixed and declared.

That by article 3 of said treaty it was provided as follows:

"The remainder of the country held in common by the Choctaws and Chickasaws shall constitute the Choctaw district, and their officers and people shall at all times have the right of safe conduct and free passage through the Chickasaw district."

That by article 4 of said treaty it was provided as follows:

"The government and laws now in operation and not incompatible with this instrument shall be and remain in full force and effect within the limits of the Chickasaw district until the Chickasaws shall adopt a constitution and enact laws superseding, abrogating or changing the same. And all judicial proceedings within said district commenced prior to the adoption of constitution and laws by the Chickasaws, shall be conducted and determined according to existing laws."

That by article 5 of said treaty it was provided as follows:

"The members of either Choctaw or Chickasaw tribe shall have the right freely to settle within the jurisdiction of the other, and shall thereupon be entitled to all the rights, privileges and immunities of citizens thereof, but no member of either tribe shall be entitled to participate in the funds belonging to any other tribe. Citizens of both tribes shall have the right to institute and prosecute suits in the courts of either, under such regulations as may from time to time, be prescribed by their respective legislatures."

That by article 7 of said treaty it is provided as follows:

"So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof regulating trade and intercourse with the Indian tribes, the Choctaws and the Chickasaws shall be secured in the unrestricted right of self-government and full jurisdiction over persons and property within their respective limits, excepting, however, all persons with their property
7 who are not by birth, adoption or otherwise citizens or members of either the Choctaw or Chickasaw tribe, and all persons not being citizens or members of either tribe found within their limits shall be considered intruders and be removed and kept out of the same by the United States agent, assisted, if necessary, by the military, with the following exceptions, viz: Such individuals as are now or may be in the employment of the Government and their families, those peaceably traveling or temporarily sojourning in the country or trading therein under license from the proper authority of the United States, and such as may be permitted by the Choctaws or Chickasaws with the assent of the United States agent to reside within their limits, without becoming citizens or members of either of said tribes."

That by article 21 of said treaty it was provided:

"This convention shall supersede and take the place of all former treaties between the United States and the Choctaws, and also of all treaty stipulations between the United States and the Chickasaws and between the Choctaws and the Chickasaws inconsistent with this agreement, and shall take effect and be obligatory upon the

contracting parties from date hereof whenever the same shall be ratified by the respective councils of the Choctaw and Chickasaw tribes and by the President and Senate of the United States."

That in pursuance of the provisions of the treaty of 1820 and of subsequent treaties the Choctaw people erected a government, distributed its powers among executive, legislative, and judicial departments, established written constitutions, developed a body of laws, written and unwritten, exercised jurisdiction over its citizens and its tribal property, administered justice, established schools, and in all respects conformed to the laws and usages of civilized States.

That in pursuance of an act of the general council of the Choctaw nation, approved October 24, 1859, representatives of the Choctaw nation in convention assembled ordained and established a constitution superseding prior constitutions, which constitution was in pursuance of said act submitted for ratification or rejection to the qualified voters of the Choctaw nation at an election held as provided by law, and was at such election adopted by the unanimous vote of all the electors participating in such election, and as thus adopted has continued as the supreme organic law of the Choctaw nation to the present time.

8 That by section 5 of article 1, entitled "Declaration of rights," contained in said constitution, it is provided:

"No person shall for the same offense be twice put in jeopardy of life or limb, nor shall any person's property be taken or applied to public use without the consent of the general council, and without just compensation being first made therefor."

That by section 11 of said article of said constitution it is provided:

"That no freeman shall be taken or imprisoned, or disseized of his freehold liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty and property but by the judgment of his peers or the law of the land."

That by section 16 of said article 1 of said constitution it is provided:

"That no power of suspending laws shall be exercised except by the general council or its authority."

That by section 1 of said article 1 of said constitution it is provided:

"That in all criminal prosecutions the accused hath a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have a compulsory process for obtaining witnesses in his favor, and in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county or district where the offense was committed; that he cannot be compelled to give evidence against himself, nor can he be deprived of life, liberty or property but by due course of law."

By section 21 of said article of said constitution it is provided:

"No conviction for any offense shall work corruption of blood and forfeiture of estate. The general council shall pass no bill of

attainder, retrospective law, nor law impairing the obligation of contracts."

By section 18 of article 7 of said constitution it is provided:

"Any citizen of this nation who may find any mine or mines or mineral waters shall have exclusive right and privilege to work the same so long as he may choose, within one mile in any direction from his works or improvements; provided, however, he does not interfere with the rights of the former settler."

That by article 7 of a treaty made and executed between
9 the United States and the Choctaw and Chickasaw nations of Indians on the 28th day of April, 1866, it was provided as follows:

"The Choctaws and Chickasaws agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of persons and property within the Indian Territory, provided, however, such legislation shall not in anywise interfere with or annul their present tribal organizations, or their respective legislatures or judiciaries, or the rules, laws, or customs of the Choctaw and Chickasaw nations respectively."

That by article 10 of said treaty it was provided as follows:

"The United States reaffirms all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw nations entered into prior to the late rebellion, and in force at that time, not inconsistent herewith, and further agrees to renew the payment of all annuities and other monies accruing under such treaty stipulations and acts of legislation, from and after the close of the fiscal year ending on the 10th day of June in the year 1866."

That said treaty contained provisions looking to the allotment in severalty of the lands held in common by the Choctaw and Chickasaw people.

That by article 33 of said treaty it was provided:

"All lands selected as herein provided shall hereafter be held in severalty by the respective parties, and all unselected land shall be the common property of the Choctaw and Chickasaw nations in their corporate capacity, subject to the joint control of their legislative authorities."

That the selection of land and the allotment of the same as provided for in said treaty was never made, and that the people of the Choctaw and Chickasaw nations have continued to this date to hold their lands as they held them before the adoption of said treaty.

That by article 26 of said treaty it was provided as follows:

"The right here given to the Choctaws and Chickasaws respectively shall extend to all persons who have become citizens by adoption or intermarriage of either of said nations, or who may hereafter become such."

That by article 38 of said treaty it was provided:

"Every white person who, having married a Choctaw or Chickasaw, resides in said Choctaw or Chickasaw nation, or who
10 has been adopted by the legislative authorities, is to be deemed a member of said nation and shall be subject to the

laws of the Choctaw and Chickasaw nation, according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw."

That by article 43 of said treaty it was provided:

"The United States promise and agree that no white person, except officers, agents and employees of the Government and of any internal improvement company, or persons traveling through or temporarily sojourning in the said nations or either of them, shall be permitted to go into said Territory unless formally incorporated and naturalized by the joint action of the authorities of both nations, into one of said nations of Choctaws and Chickasaws, according to their laws, customs or usages, but this article is not to be construed to affect parties heretofore adopted, or to prevent the employment temporarily of white persons who are teachers, mechanics, or skilled in agriculture, or to prevent the legislative authorities of the respective nations from authorizing such works of internal improvement as they may deem essential to the welfare and prosperity of the community, or be taken to interfere with or invalidate any action which has heretofore been had in this connection by either of said nations."

By article 45 of said treaty it is provided as follows:

"All the rights, privileges and immunities heretofore possessed by said nations or individuals thereof, or to which they were entitled under the treaties and legislation heretofore made and had in connection with them, shall be, and are hereby declared to be in full force so far as they are consistent with the provisions of this treaty."

2.

That under and by virtue of the provisions of the Choctaw constitution, in section 18 of article 7 above set out, citizens of the Choctaw nation, from the time of its adoption, began to prospect for coal and incurred much expense in making discoveries of coal theretofore unknown; that from said date without interruption or hindrance to June 28, 1898, they exercised the right of working by themselves or licensing or contracting with other persons to work for them said coal discoveries and to mine coal thereon for the space of one mile in every direction from the improvements made upon said coal discovery; that such coal discoveries within such limits were, by uniform custom, usage, and construction, from the adoption of the constitution, as aforesaid, held to be the property of the Choctaw citizen discovering the same or of those to whom he
11 devised or assigned the same, provided such devisees or assignees were citizens of the Choctaw nation; that from the adoption of the constitution aforesaid the custom and usage of leasing said coal claims by the discoverers to persons or companies or corporations for the purpose of mining coal thereon for a stipulated royalty to be paid to the owner of said coal discovery has been uniform and long since became thoroughly established and general throughout the Choctaw nation; that said nation recognized the

rights of such coal discoverer to lease such coal claims and to receive royalties thereon and the uniform custom and usage that had grown up under such constitutional provision, as aforesaid; that said nation, by act of its council, approved by its governor, passed laws by which the persons or companies or corporations working such coal claims under leases from the individual owners thereof, as aforesaid, before they were permitted to sell the coal mined were required to obtain a contract from the national agent of said Choctaw nation, giving them the right to sell said coal upon payment of stipulated royalties to the Choctaw nation, amounting to one-half cent per bushel of coal.

A copy of such act of the Choctaw council, approved October 30, 1888, and found on pages 106, 107, 108, 109, and 110 of Durant's Code of the Laws of the Choctaw Nation, is hereto attached, marked "Exhibit A," made a part of this complaint, and specially plead as a part hereof.

That under such law persons, companies, and corporations mining coal upon the coal discoveries leased from individuals, mine-owners, and claimants, as aforesaid, obtained constracts from the national agent of the Choctaw nation in form and substance the same as that which is attached hereto, marked "Exhibit B," and made a part hereof, and which was obtained by defendant Woods from the national agents of said nations.

12 That the rights of the discoverers of coal claims, their heirs or assigns, to work, lease, or assign such claims were fully recognized in all the Choctaw courts, became the subject of devise or administration in the courts of the Choctaw nation on the death of said discoverer or owner of said coal claims, were sold, transferred, and pledged by one member of the nation to another in all the modes incident to absolute ownership of property, and the royalties payable from the lessees of said coal claims were pledged as security for advancements of money or supplies and became the basis of large advancements in a business way by persons within and without the Choctaw nation.

That the rights of coal discoverers, their heirs or assigns, to the coal claims within the limits above set out, as established under the uniform custom and usage of the Choctaw nation and the construction of the Choctaw constitution, as aforesaid, were known to and fully recognized by the executive officers of the United States, the Secretaries of the Interior and their agents, inclusive, and that the same were fully recognized by the Congress in various acts of legislation; that in the courts of the United States these rights, originating under the constitutional provision and under the laws, custom, and usage in the Choctaw nation, as above set out and as herein stated and declared, were at all times recognized, vindicated, upheld, and enforced.

That under the clause of the Choctaw constitution aforesaid and the usage and custom in the Choctaw nation with reference to mines and minerals thereunder, the discovery of coal was, as heretofore stated, attempted by great numbers of the citizens of the Choctaw nation at much and great expense, both of time, labor, and

money, resulting in many discoveries of coal which were worked by the discoverers or owners or were leased by them to persons, companies, or corporations to be worked and mined, thereby
13 greatly promoting the development and welfare of the Choctaw nation, producing large royalties for said nation, which became the support of its schools, and tending to advance the civilization and education of the entire Choctaw people, such royalties for the past four or five years amounting to over $100,000 per annum.

That it became the settled policy of said Choctaw nation to encourage coal discoveries by its citizens and to cause the development of coal production by permitting the sale of such coal claims to other Choctaw citizens and the leasing of such claims or discoveries to persons or companies or corporations to mine coal thereon, as aforesaid; that in 1889 it passed an act entitled "An act to provide for the further development of the mineral resources of the Choctaw nation," a copy of which act is hereto attached, marked "Exhibit C," made a part hereof, and specially plead as part of this complaint.

That by its constitutional provision, its laws, usages, and customs, and its definite and consistent policy, as aforesaid, not only were citizens of the Choctaw nation induced to incur expense in attempting and making coal discoveries, as aforesaid, but great numbers of persons, companies, and corporations not citizens of the Choctaw nation were led to obtain, with the full knowledge and approval of the constituted authorities of the Choctaw nation, leases of said coal claims and discoveries from the individual Choctaw citizens discovering and owning the same; that for the purpose of mining coal on such leased coal claims said persons, companies, and corporations incurred great expense in preparing the mines to be worked, in purchasing expensive machinery, and establishing mining plants, erecting houses for the miners, and establishing stores; that the improvements and outlays of such companies and corporations aggregated millions of dollars, expended upon the basis of
14 the rights of the individual discoverers and owners of coal claims, as herein averred; that the policy of the Choctaw nation to increase its revenues and promote the welfare of its people by stimulating the discovery of coal by its citizens and the production of coal through their efforts in inducing capitalists to establish mining plants on the individual coal claims upon the payment of stipulated royalties to the nation and the individual was followed steadily and consistently and found repeated legislative expression; that finally, on September 18, 1896, it passed an act to confirm and place beyond question the rights of its citizens to spur their energies in coal development and to reassure coal-producers in their lease contracts with individual owners of coal claims. Such act was as follows:

"Be it enacted by the general council of the Choctaw nation assembled:

SEC. 1. That the constitutional rights of any citizen of the Choctaw nation to discover and claim any mine or mineral substance, or

anything of value found beneath the surface of the earth in this nation, and the right to work the same for the purpose of having such discovery made of value to himself and to the nation, as provided for by act of council passed and approved December 27, 1889 entitled 'An act to provide for the further development of the mineral resources of the Choctaw nation' is hereby ratified and affirmed and all such claims and discoveries where the laws of this nation have been observed in making and recording the same, are hereby declared to be the property of the citizen or citizens who have discovered and recorded such claims, their heirs or assigns, and are to be recognized and treated as the property of the citizens holding such claims, and may be by such holders sold, assigned, or devised unto their heirs or assigns, provided the said heirs or assigns shall be citizens of the Choctaw nation at the time of making such disposition of such claims; and citizens holding such claims may lease them to non-citizens or foreign corporations, provided always that the interest and rights of the Choctaw nation are recognized in such leases. All leases of coal or other mineral rights heretofore made by citizens of the Choctaw nation to non-citizens or foreign corporations, in which leases the interest and rights of the Choctaw nation have been recognized, the laws of the Choctaw nation observed, and the conditions and stipulations on the part of the lessee fulfilled, are hereby ratified and confirmed.

SEC. 2. That it shall be the duty of the national agent of the Choctaw nation to encourage and assist in every way in his power, all citizens of this nation in discovering and developing its mineral or other resources, and where any mineral or other thing of value is discovered, not theretofore known to exist in this nation nor provided in the royalty tables of the nation, then and in that event the national agent shall, with the advice and consent of the principal chief of the nation, promptly fix the royalty to be paid over to the nation during the pending of the working or lease of such claims, and shall use the utmost diligence in bringing about the successful workings of claims and consequent increase of revenue of this nation.

SEC. 3. This act shall take effect and be in full force from and after its passage. Approved September 18, 1896."

3.

That under and by virtue of the conventions and agreements between the Choctaw nation and the Chickasaw nation, as heretofore set out, each nation recognized in the other the right to legislate over the persons and property within the limits of their respective districts; that each nation enacted its own legislation for the protection and development of mining rights and interests within their respective limits; that the uniform usage and custom of the Choctaw nation with reference to coal claims and discoveries, and its constitutional provision in regard thereto, as heretofore set out, were fully known, acquiesced in, and consented to by the Chickasaw nation and the constituted authorities thereof; that the proportion of royalty justly payable to the Chickasaw nation

and arising from the sale of coal or other minerals produced in the Choctaw nation, under the constitution, laws, usages, and customs thereof, as above set out, became, soon after the adoption of the constitutional provision as to mines and minerals aforesaid, a matter of consideration between the constituted authorities of the two nations, under the sanction of the Interior Department of the United States, and by an arrangement between the two nations under such sanction the Chickasaw nation became entitled to receive one-fourth of the coal royalties arising from the sale of coal mined in the Choctaw nation in manner and under the laws and usages aforesaid; that the constituted authorities of the Chickasaw nation have during a long period of years received their one-fourth of such royalty and have applied the same to their national uses.

4.

That heretofore, to wit, on the 7th day of November, 1890,
16 plaintiffs Gleason, Edmonds, and one Lorin A. Riddle, a citizen by blood of the Choctaw nation, proceeding in conformity with its constitutional provision touching mines and mineral waters and the laws, usage, and custom of said nation, as above set out, prospected for and, at the expense of time, labor, and money by them incurred, discovered coal within the present limits of the Choctaw nation, as defined by provisions of treaties heretofore set out, at a point where coal was not theretofore known to exist and from which point within a mile in any direction it was not known to exist theretofore, said point of discovery being about 250 yards south of the road-bed of the Choctaw Coal & Railroad Company and 350 yards south of the William A. Riddle place on the old overland road from Fort Smith, Arkansas, to Springtown, I. T. Plaintiffs aver that within the limits of said coal discovery there was no settler at the time of said discovery, and that they did not and have not interfered in anywise with the rights of any former settler in prospecting for and discovering coal as herein alleged and in producing coal and leasing said coal claims as hereinafter alleged.

That said plaintiffs and said Lorin A. Riddle duly recorded said coal discovery in the office of the county clerk of Gaines county, Choctaw nation, in which county said discovery was situated; that said plaintiffs and said Riddle made an excavation at the point of discovery, and by an expenditure of labor and money produced coal therefrom which they used and disposed of; that by virtue of these facts, under the constitutional provision of the Choctaw nation aforesaid and under the laws, usages, and customs of said nation as above set out, and, in particular, under the acts of the Choctaw council as heretofore pleaded, plaintiffs Gleason and Edmonds and the said Lorin A. Riddle acquired the right to mine coal within a circle having a radius of one mile and beginning at the point of ex-
17 cavating coal, as aforesaid, and to give, bequeath, sell, transfer, convey, or assign said right to any other Choctaw citizen, and to contract by lease or otherwise with any person, company, or corporation to mine coal for a period of years within the circle aforesaid, to the exclusion of any other persons, companies, or cor-

porations whatsoever so long as said persons, companies, or corporations complied with the laws of the Choctaw nation to them and their mining operations applicable; that said right of said Gleason, Edmonds, and Riddle, as thus stated, became vested, absolute, and indefeasible so long as they chose to exercise the same; that plaintiffs Gleason and Edmonds have continually from the time of discovery of coal on said claim to this time chosen and do now choose to exercise and exert their rights as above declared in and to said coal claim, and do hereby assert and declare the same; that in like manner the said Lorin A. Riddle did continuously from the time of the discovery aforesaid choose to exercise and did exercise his right as above declared in and to said coal claim and discovery until he sold and conveyed the same to the plaintiff W. H. Ansley; that in the exercise of his rights in the premises the said Lorin A. Riddle on February 28, 1898, sold and conveyed to plaintiff W. H. Ansley, for a valuable consideration by said Ansley to him paid, his undivided one-third interest in said coal claim; that the same was acquired, as the discovery of Gleason, Edmonds, and Riddle had been made, in the faith induced by the terms of the treaties aforesaid, the constitution and laws, usages and customs of the Choctaw nation above set out, the uniform course of business dealing with reference to such coal claims and discoveries as known to the authorities of the United States and assented to by the authorities of the Choctaw and Chickasaw nations and vindicated, declared, established, and upheld by the courts of the Choctaw nation
18 and of the United States; that by virtue of the purchase by plaintiff Ansley of the right and interest of Lorin A. Riddle in said coal claim and discovery in manner as aforesaid said plaintiff acquired a vested right in and to the same, perfect, absolute, and indefeasible, and existing so long as he chose to exercise the same; that he chooses still to exercise and enjoy said right, and seeks by this action to have the same protected and preserved.

Plaintiffs further say that if they are in law mistaken as to the duration of their right in the coal claim above described under the facts herein stated, then they allege that said right is vested, absolute and indefeasible so long as the Choctaw nation shall exist as a nation and until said right shall have been divested in the mode provided by the laws of said nation.

That for the work and labor done and money expended by plaintiffs in making coal discoveries and for producing coal thereon, and for such work done and money expended in connection with their coal claim and discovery herein described, they have not been, reimbursed, paid, or compensated; that plaintiffs' rights in said coal discovery, as herein averred, exceed in value the sum of five thousand dollars.

5.

That heretofore, to wit, on the 8th day of December, 1896, plaintiffs Gleason, Edmonds, and the said Lorin A. Riddle entered into a contract with the defendant O. E. Woods, whereby the said Woods was authorized and permitted to conduct mining operations and to

mine coal on the coal claim or discovery above described for the period of six years from the date of said contract, in consideration of his paying to said plaintiffs and said Lorin A. Riddle a royalty of one-fourth of one cent per bushel on all coal mined on said discovery or coal claim, which was the customary royalty, and upon his compliance with the laws of the Choctaw nation in such
19 mining operations applicable, a copy of which lease is hereto attached, marked "Exhibit —," and made a part hereof; that the said Woods, by arrangement and agreement with the defendant The Ola Coal & Mining Company, authorized said company to mine coal within the limits of said coal claim or discovery as above described; that the terms of said agreement are not known to these plaintiffs and cannot more particularly be set out, but under such agreement said Ola Coal and Mining Company became bound to pay plaintiffs royalty on coal produced by it on the coal claim aforesaid according to the terms of the original agreement between Woods and plaintiffs Gleason, Edmonds, and said Lorin A. Riddle; that said O. E. Woods and said Ola Coal & Mining Company have under the contract from plaintiffs aforesaid mined coal within the limits of said coal claim or discovery, as above described, to the amount of — tons; that for said coal so mined by them they are indebted to plaintiffs in the sum of eleven hundred dollars, which is due and payable.

6.

Plaintiffs further aver that by section 16 of an act of Congress entitled "An act for the protection of the people of the Indian Territory, and for other purposes," approved June 28, 1898, it was made unlawful for any person, after the passage of said act, to claim, demand, or receive, for his own use or the use of any one else, any royalty on oil, coal, asphalt, or other mineral within the limits of any of the tribes in the Indian Territory, or for any one to pay any individual any such royalties or rents or any consideration therefor whatsoever.

By section 18 it was provided that any person convicted of violating the above provision should be deemed guilty of a misdemeanor, and punished by a fine of not less than $100, and should stand committed until such fine and costs were paid, and
20 should forfeit possession of any property in question, and that each day on which said offence was committed or continued to exist should be deemed a separate offence.

That by section 29 of said act it was provided as follows:

"That the agreement made by the commission to the five civilized tribes with commissions representing the Choctaw and Chickasaw tribes of Indians on the 23rd day of April, 1897, as herein amended, is hereby ratified and confirmed, and the same shall be of full force and effect if ratified before the first day of December, 1898, by a majority of the whole number of votes cast by the members of said tribes at an election held for that purpose; and the executives of said tribes are hereby authorized and directed to make public proclamation that said agreement shall be voted on at the next gen-

eral election, or at any special election to be called by such executives for the purpose of voting on said agreement; and at the election held for such purpose, all male members of each of said tribes qualified to vote under his tribal laws shall have the right to vote at the election precinct most convenient to his residence, whether the same be within the bounds of his tribe or not; provided, that no person whose right to citizenship in either of said tribes or nations is now contested in original or appellate proceedings before any United States court shall be permitted to vote at said election; provided, further, that the votes cast in both tribes or nations shall be forthwith returned duly certified by the precinct officers to the national secretaries of said tribes or nations, and shall be presented by said national secretaries to a board of commissioners consisting of the principal chief and national secretary of the Choctaw nation, the governor and national secretary of the Chickasaw nation, and a member of the commission to the five civilized tribes to designated by the chairman of said commission; and said board shall meet without delay at Atoka, in the Indian Territory, and canvass and count the votes and make proclamation of the result, and if said agreement, as amended be so ratified, the provisions of this act shall then only apply to said tribes where the same do not conflict with the provisions of said agreement."

That, pursuant to the provisions of this section, an election was held in the manner therein provided on the 24th day of August, 1898, in which — votes were cast in favor of said agreement and — votes against it. Thereupon it was proclaimed by the persons designated in said section, on the — day of ——, that said agreement had been adopted; that by said agreement it was provided as follows:

"It is agreed that all the coal and asphalt within the limits of the Choctaw and Chickasaw nations shall remain and be the common property of the members of the Choctaw and Chickasaw tribes (freedmen excepted) so that each and every member shall have an equal and undivided interest in the whole; and no patent provided for in this agreement shall convey any title thereto. The reve-
21 nue from coal and asphalt, or so much as shall be necessary, shall be used for the education of the children of Indian blood of the members of said tribes. Such coal and asphalt mines as are now in operation and all others which may hereafter be leased and operated, shall be under the supervision and control of two trustees, who shall be appointed by the President of the United States, one on the recommendation of the principal chief of the Choctaw nation, who shall be a Choctaw by blood, whose term shall be for four years, and one on the recommendation of the governor of the Chickasaw nation, who shall be a Chickasaw by blood, whose term shall be for two years, after which the term of appointees shall be for four years. Said trustees, or any of them, may at any time be removed by the President of the United States for good cause shown. They shall each give bond for the faithful performance of their duties under such rules as may be prescribed by the Secretary of the Interior. Their salaries shall be fixed and paid by their re-

spective nations, each of whom shall make full reports of all his acts to the Secretary of the Interior quarterly. All such acts shall be subject to the approval of said Secretary.

All coal and asphalt mined in the two nations, whether now developed or hereafter to be developed, shall be operated and the royalties therefrom paid into the Treasury of the United States, and shall be drawn therefrom under such rules and regulations as shall be prescribed by the Secretary of the Interior.

All contracts made by the national agents of the Choctaw and Chickasaw nations for operating coal and asphalt, with any person or corporations which were, on April 23rd, 1897, being operated in good faith, are hereby ratified and confirmed, and the lessee shall have the right to renew the same when they expire subject to all the provisions of this act.

All agreements heretofore made by any person or corporation with any member or members of the Choctaw and Chickasaw nations, the object of which was to obtain such member or members' permission to operate coal or asphalt, are hereby declared void; provided, that nothing herein contained shall impair the rights of any holder or owner of a leasehold interest in any oil, coal rights, asphalt or mineral which have been assented to by act of Congress, but all such interests shall continue unimpaired hereby, and shall be assured by new leases from such trustees of coal or asphalt claims described herein, by applications to the trustees within six months after the ratification of this agreement, subject, however, to payments of advance royalties herein provided for. All leases under this agreement shall include coal or asphaltum or other mineral as the case may be in or under nine hundred and sixty acres, which shall be in a square as nearly as possible, and shall be for thirty years. The royalty on coal shall be fifteen cents per ton of two thousand pounds on all coal mined, payable on the 25th day of the month next succeeding that in which it is mined. Royalty on asphalt shall be sixty cents per ton payable same as coal: Provided, that the Secretary of the Interior may reduce or advance royalties on coal or asphalt when he deems it for the best interests of the Choctaws and Chickasaws to do so. No royalties shall be paid except into the Treasury of the United States as herein provided.

All lessees shall pay on each coal or asphalt claim at the rate of one hundred dollars per annum in advance for the first and second years; two hundred dollars per annum, in advance, for the third and fourth years; and five hundred dollars for each succeeding year thereafter. All such payments shall be treated as advanced royalty on the mine or claim on which they are made, and shall be a credit as royalty when each said mine *in* developed and operated, and its production is in excess of such guaranteed an-
22 nual advanced payments, and all persons having coal leases must pay said annual advanced payments on each claim whether developed or undeveloped; provided, however, that should any lessee neglect or refuse to pay such annual advanced royalties for the period of sixty days after the same becomes due and payable on any lease, the lease on which default is made shall become

null and void, and the royalties paid in advance thereon shall then become and be the money and property of the Choctaw and Chickasaw nations.

In surface, the use of which is reserved to present coal operators, shall be included such lots in towns as are occupied by lessees' houses, either occupied by said lessees' employees, or as offices or warehouses; provided, however, that in those town sites designated and laid out under the provisions of this agreement where coal leases are now being operated and coal is being mined, there shall be reserved from appraisement and sale all lots occupied by houses of miners actually engaged in mining, and only while they are so engaged, and in addition thereto sufficient amount of land, to be determined by the town site board of appraisers, to furnish homes for the men actually engaged in working for the lessees operating said mines, and a sufficient amount for all buildings and machinery for mining purposes; and provided further, that when the lessees shall cease to operate said mines, then and in that event the lots of land so reserved shall be disposed of by the coal trustees for the benefit of the Choctaw and Chickasaw tribes.

That whenever the members of the Choctaw and Chickasaw tribes shall be required to pay taxes for the support of schools, then the fund arising from such royalties shall be disposed of for the equal benefit of their members (freedmen excepted) in such manner as the tribes may direct."

7.

That pursuant to the provisions of said agreement the governor of the Choctaw nation did heretofore nominate the defendant N. B. Ainsworth to be coal trustee, as in said agreement provided, and the governor of the Chickasaw nation did heretofore nominate the defendant L. C. Burriss to be coal trustee for the Chickasaw nation, as in said agreement provided; that the President of the United States has appointed said defendants N. B. Ainsworth and L. C. Burriss to be said coal trustees, and said defendants have qualified as such trustees in the mode provided by law.

That pursuant to the provisions of the said agreement the Secretary of the Interior has issued regulations governing mineral leases and other matters in the Choctaw and Chickasaw nations in the Indian Territory, by section 3 of which regulations it is provided as follows:

" It shall be the duty of the trustees to receive applications
23 from parties desiring to make leases of lands within the Choctaw and Chickasaw nations for the purpose of engaging in the mining of coal, asphalt and other minerals, to examine said applications and transmit the same, with the report of facts, to the United States Indian inspector stationed in the Indian Territory, and on receipt of authority from him for that purpose, to enter jointly into leases with all parties to whom the privilege of leasing lands in said nations for mining purposes shall be approved by him, in such form as shall be prescribed by the Secretary of the Interior."

That the defendants Wood and Elliott, as plaintiffs are informed and believed, intend as officers of the Ola Coal & Mining Company to make and will, unless restrained by this honorable court, make to said defendants, Ainsworth and Burriss, as trustees, application for a lease to said Ola Coal & Mining Company covering the coal claim or discovery belonging to plaintiffs, as above described and set out; that said trustees intend to receive said application and forward the same to the United States Indian inspector provided for in the regulations aforesaid, and, if authority be obtained from him, to execute a lease of said premises to defendant The Ola Coal & Mining Company or to defendants Woods and Elliott or one of them for its use and benefit, as aforesaid, and to forward said lease to the Secretary of the Interior for approval; that said defendants, Woods, Elliott, and The Ola Coal & Mining Company, since the adoption of the act of Congress approved June 28th, 1898, as aforesaid, have failed and refused and still fail and refuse to pay the royalties accruing to plaintiffs under and by virtue of the terms of their obligations to them, as aforesaid, as well as the royalties which had accrued and were payable under the terms of said lease prior to said date; that said royalties amount to the sum of eleven hundred dollars, which is due and payable; that said defendants, Woods, Elliott, and The Ola Coal & Mining Company, unless restrained by this honorable court, intend to pay and will pay the royalties due to plaintiffs under and by virtue of its lease aforesaid and the royalties hereafter accruing from the production of coal on said coal claim into the Treasury of the United States, and to wholly and totally disregard the rights of these plaintiffs to the same.

24 8.

That by the provisions of said agreement as above set out, and by the acts of the defendants Woods, Elliott, and The Ola Coal & Mining Company in refusing to pay the royalties due to plaintiffs, as aforesaid, because of the provisions of sections 16 and 18 of the act of Congress above set out, and their proposed payment unless restrained by the action of this court of said royalties into the Treasury of the United States, as aforesaid, plaintiffs are deprived of their property without notice, without hearing, and in violation of the fifth amendment to the Constitution of the United States, wherein it is provided that no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation, and in violation of section 1 of the fourteenth amendment to the Constitution of the United States, by which it is provided that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

That by the action of the defendants Woods, Elliott, and The Ola Coal & Mining Company in making application for and in obtaining leases to the premises included in plaintiffs' lease to said defend-

ants, and by the action of said defendants, Ainsworth and Burriss, in receiving said application, transmitting the same to the United States inspector for the Interior Department in the Indian Territory, receiving his approval, and executing said leases and forwarding the same to the Secretary of the Interior, if such acts be permitted a cloud will be cast upon plaintiffs' right to said premises and upon their right to work the same by themselves or their lessees, and by the operation and enforcement of the provisions of the
25 agreement purporting to be between the United States and the Choctaw nation, as above set out, plaintiffs are deprived of property without hearing, without notice, without compensation, and without due process of law, and against such due process, in violation of the fifth amendment to the Constitution of the United States, providing that no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation, and in violation of the provisions of the fourteenth amendment to the Constitution of the United States, providing that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

9.

That the provisions of said agreement above set out, so far as they deprive plaintiffs of their right in the coal claim or discovery aforesaid and of their right to the royalties contracted to be paid by the defendants Woods, Elliott, and The Ola Coal & Mining Company for mining coal upon the same, and so far as they confer authority upon the Secretary of the Interior to make regulations under and by virtue of which the said N. B. Ainsworth and L. C. Burriss, trustees, are authorized to receive applications to lease said coal claim or discovery, or any part thereof, and to forward the same to the Indian inspector for the Interior Department in the Indian Territory, and to receive authority from him to execute such leases and to forward the same to the Secretary of the Interior for approval, authorize plaintiffs' property to be taken and applied to public use without the consent of the general council of the Choctaw nation thereunto first had and obtained, and without just compensation being first
26 made therefor, in violation of section 5 of article 1 of the constitution of the Choctaw nation, heretofore set out, and authorize plaintiffs to be disseized of their freehold liberties and privileges and deprived of their property otherwise than by the judgment of their peers or the law of the land, in violation of section 11 of article 1 of the constitution of the Choctaw nation, heretofore set out, and authorize the taking of plaintiff's property without due course of law, but against such due course of law, in violation of section 17 of article 1 of the constitution of the Choctaw nation heretofore set out.

That such provisions of the agreement impair the obligation of the contract arising and existing between plaintiffs and the Choctaw

nation under the facts heretofore set out, by virtue of the provision in its constitution with reference to the rights of coal discoverers heretofore mentioned, in violation of section 27 of article 1 of the constitution of the Choctaw nation.

That said provisions of the Choctaw constitution and the provisions thereof with reference to the rights of discoverers of coal or other minerals, as above set out, were made in pursuance of treaties of the United States authorizing same and expressly validating said constitutional provisions when enacted, as specially appears from the provisions of article 2 of the treaty of 1820 and article 7 of the treaty of 1855 and article 43 of the treaty of 1866, all of which articles have heretofore been set out; that the rights of plaintiffs arising under the customs, laws, usages, and constitution of the Choctaw nation authorized to be enacted and adopted by the treaties with the United States and reaffirmed and validated after enactment by said treaties are rights acquired and vested in and by virtue of the treaties and laws of the United States and not defeasible by legislation of the Congress of the United States
27 or of the Choctaw nation or otherwise than by due process of law after notice and hearing and with full compensation.

10.

Plaintiffs further aver that the purported agreement between the Choctaw nation and the United States was not adopted in mode or form known to the laws, for by section 11 of article 7 of the constitution of the Choctaw nation it is provided as follows:

"The general council shall have the power to pass such laws and measures as they shall deem expedient for the general good of the Choctaw people, provided, no law be passed or adopted contrary to the provisions of this constitution."

By section 1 of article 9 of said constitution it is provided as follows:

"Whenever a majority of the members of the general council assembled shall deem it necessary, they may propose an amendment or amendments to this constitution, which amendments shall be submitted by the national secretary, at least four months preceding the next regular election, at which the qualified voters shall vote directly for and against said proposed amendment or amendments, and if it shall appear that a majority of the qualified voters shall have voted in favor of such amendment or amendments, then the same may be incorporated as a part of this constitution at the next succeeding general council."

That the agreement aforesaid was never submitted to nor adopted by the general council of the Choctaw nation under the constitutional authority vested in them, nor was it proposed by the majority of the members of the general council as an amendment to the constitution, nor as such amendment submitted by the national secretary at least four months preceding the next regular election, to be voted on by the qualified voters of the Choctaw nation, but such election was held by virtue of a proclamation by the governors of the Choctaw and Chickasaw nations, acting without authority con-

ferred upon them by any law defining their duties as governors of said nations or pertaining to their respective offices, and at such election members of the Chickasaw nation were permitted to vote at voting places in the Choctaw nation and members of the
28 Choctaw nation to vote at voting places in the Chickasaw nation, whereby the opportunity for fraudulent practices and duplication of votes in such election was furnished and afforded, and by reason whereof it is not possible to know whether said agreement received a majority of the votes cast by the qualified voters of the Choctaw nation.

That such agreement affects the title to the land belonging to the Choctaw and Chickasaw people by grant from the United States and a patent executed in pursuance thereof, as well as the other property of the Choctaw and Chickasaw people, these plaintiffs inclusive; that by virtue of such agreement the property rights of the Choctaw and Chickasaw people in general and of these plaintiffs in their coal discovery, as above set out, in particular, were changed, modified, and in the latter case destroyed by an agreement against which nearly one-half of the votes cast were recorded, and which was submitted in accordance with none of the forms of procedure of the Choctaw or Chickasaw nation, as provided by their constitution and laws made in pursuance of treaties with the United States.

That these plaintiffs and the Choctaw people held and acquired their property rights subject to general powers of legislation on the part of the Choctaw nation, as limited and defined by the constitution and laws thereof, executed consistently with the Constitution and laws of the United States, and that such rights were not subject to be divested, changed, modified, or in any way impaired, except by due course of legislation enacted consistently with the constitution and laws of the Choctaw nation, as aforesaid, adopted in harmony with the Constitution and laws of the United States.

That said agreement having been adopted in manner and form otherwise than as provided by said constitution and laws of the Choctaw nation, and divesting and destroying, changing and impairing many of the rights of the plaintiffs as members of the Choctaw nation, and in particular destroying their rights of
29 property in the coal discovery aforesaid, was, because of the mode and form of its promulgation and adoption, not adopted by due course of law, but against said due course of law and in violation of the fifth and fourteenth amendments to the Constitution of the United States, as above set out; that by reason of this fact the regulations of the Secretary of the Interior, and the proposed action of the defendants Ainsworth and Burriss as trustees in executing the same by receiving applications of the defendants Woods, Elliott, and The Ola Coal & Mining Company for leases upon the coal claim or discovery of plaintiffs aforesaid, by obtaining authority from the inspector of the Interior Department to execute the same, and by executing the same and forwarding such lease to the Secretary of the Interior for approval, are acts without warrant in

law, which will entail great and irreparable injury to these plaintiffs for which they are entirely remediless at law.

11.

Plaintiffs further aver that said agreement, so far as it impairs, destroys, modifies, or changes the property rights of the citizens of the Choctaw nation and of these plaintiffs, is inoperative and void, because it does not rest upon the free consent of the people of the Choctaw or Chickasaw nations or a majority of their qualified electors or of any of its citizens; that the appearance of consent to said agreement, existing by reason of the fact that a majority of the votes at the election aforesaid were cast in its favor, is false, specious, and unreal, because the voters voting in favor of the same were compelled thereto by coercion and duress, exercised by the United States as follows:

By the act of Congress approved June 7, 1897, the jurisdiction of the courts of the Choctaw and Chickasaw nations as theretofore existing was taken away, and after January 1st, 1898, conferred upon the
30 United States courts in the Indian Territory, but by said act it was provided that said nations could avoid the effect of this provision by entering into agreement on or before January 1st, 1898, with the commission to the five civilized tribes theretofore appointed on the part of the United States to treat with said tribes; that commissions on behalf of said Choctaw and Chickasaw nations respectively were appointed by the authorities thereof, who met with said commission of the United States and framed the agreement aforesaid; that said agreement was submitted to the council of the Chickasaw nation, and by said council rejected; that such agreement was never submitted to the council of the Choctaw nation; that by the failure to adopt such agreement the jurisdiction of the courts of said nations was taken away by the operation of the act of Congress aforesaid and vested in the United States courts on and after January 1st, 1898.

That the members of said nations were deeply attached to their government with its courts and legislative and executive functions, and were wholly averse to surrendering the same or any part thereof, but preferred to lose the same rather than accept the provisions of said agreement; that after the jurisdiction of their courts had been taken away by operation of the act of June 7th, 1897, said agreement was amended and ratified by the Congress of the United States in the act of June 28, 1898, and directed to be submitted to the qualified electors of the said nations, as hereinbefore set out; that the said act of June 28, 1898, provided in section 26 thereof as follows:

"That on and after the passage of this act, the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the court of the United States in the Indian Territory."

That by the act of June 7th, 1897, the jurisdiction to enforce all laws in the Indian Territory had become vested in the United States courts, which thereupon enforced and upheld the laws
31 of said nations whenever they were the basis of property rights, as said courts had done from their organization in

the Indian Territory; that by the provisions of this section such courts were forbidden to enforce at law or in equity the laws of the Choctaw or Chickasaw nation; that the effect of this provision was that the only courts in which the members of these tribes could assert their rights or seek for redress of injuries were forbidden to recognize any right based upon the laws theretofore controlling the members of said nations and defining their personal and property rights. By this situation the tenures of all holdings by citizens of the Choctaw and Chickasaw nations, the descent of property, the devolution of estates, and all the rights of property in whatever form arising or existing, as declared by the only law in which such rights had foundation or origin, were swept away by being rendered unenforcible in the only courts having jurisdiction of the parties.

By the same act of Congress which inhibited the enforcement at law or in equity of the laws of the Choctaw and Chickasaw nations by the United States court the agreement was resubmitted, and the citizens of said nations were enabled to secure the continued existence of their governments and their laws and to revest jurisdiction in their courts to enforce the laws by adopting such agreement, and thereby at the same time to avoid the disastrous consequences to personal and property rig[illegible] the anarchy with reference to the same necessarily created, if they failed to accept such agreement; that influenced by the desire to continue the government of the nations and the jurisdiction of their courts, and coerced by the suspension of all laws upon which their rights vested, the electors of said nations, against their will and inclination, in the absence of their free consent or desire, voted for said agreement, and by reason of the coercion and duress placed upon them, in manner and form as stated, said agreement, so far as it purports to rest upon the
32 consent of the Choctaw and Chickasaw nations, and to in anywise affect the property rights of the members of said nations and of these plaintiffs, and to authorize the acts proposed to be done thereunder by defendants, as before averred, is wholly inoperative, ineffectual, and void, for plaintiffs aver that the adoption of said agreement, secured as aforesaid*ed*, was not by due process of law, but against such due process of law, by reason whereof the same is in violation of the fifth and fourteenth amendments to the Constitution of the United States, so far as said agreement is made the basis for divesting property rights of plaintiffs under former laws vested and enjoyed.

12.

That from the time the commission of the United States to the five civilized tribes was created, the members of said tribes were continuously informed by said commission by private, public, and published utterances that unless said tribes made agreements changing the tenures of their land holdings and the rights of their respective governments the United States would do these things by the exercise of its own plenary powers without regard to the will or inclination of said tribes; that after the adoption of the act of Congress of June 28, 1898, and the ratification by the Congress of the

agreement aforesaid, the members of said Choctaw and Chickasaw nations were again told, in them manner aforesaid, by the members of said commission, that unless said agreement were adopted the United States would not only enforce the provisions of the act of June 28th, but would adopt more stringent and radical legislation affecting said tribes and the members thereof; that by these representations and statements the members of said tribes were further coerced and compelled against their will and without their consent or desire into voting for said agreement.

32*a* 12.

That the agreement aforesaid and all the provisions of the act of June 28th, 1898, not therein contained which impaired or affected the property rights of the Choctaw and Chickasaw nations and of the members thereof individually, and so far as they affected or impaired the rights of these plaintiffs in their coal claim aforesaid are inoperative and void because in said act and in said agreement and by the mode of their enactment and adoption Congress delegated its powers of legislation to the voters of the Choctaw and Chickasaw nations in violation of sections 1 and 7 of article 1 of the Constitution of the United States.

33 13.

Plaintiffs say that if defendants Elliott, Woods, and The Ola Coal & Mining Company are permitted, as they propose, to make application for lease of the coal claim or discovery aforesaid belonging to plaintiffs and to obtain leases therefor, plaintiffs' right in the premises will be clouded and they exposed to great and irreparable injury; that under the law as contained in article 16 of the act of June 28th, 1898, aforesaid, if plaintiffs claim or demand the royalties due from said defendants, or which may hereafter become due, they subject themselves to a fine of one hundred dollars for each claim or demand so asserted; that these penalties in the course of a few years will become great in amount and expose these plaintiffs to the necessity and the humiliation of defending charges of crime against the laws, as well as to the loss of their property in making defense; that if the defendants above named pay said royalties into the Treasury of the United States, as they propose, these plaintiffs will be without remedy, forasmuch as they are unable to sue the United States for the same; that if said defendants pay said royalties to an officer of the United States, in pursuance of said agreement, it is doubtful whether these plaintiffs can establish liability against them therefor; that in order to establish such liability for each recurring amount of royalty as it falls due they would be compelled to bring a multiplicity of suits.

14.

Wherefore they say that in view of the premises they are remediless at law, and seek the relief of this court of equity, and pray that the defendants The Ola Coal & Mining Company, James Elliott, and O. E. Woods as individuals and officers of said Ola Coal

& Mining Company, their agents, attorneys, employees, and servants, and each and every of them, be restrained from paying said
34 royalties now due these plaintiffs and which may hereafter become due them by virtue of the production of coal on said coal claim or discovery, as above described, into the Treasury of the United States, and that they and each of them, individually and officially, the agents, attorneys, employees, and servants of each and every of them, and all other persons, companies, and corporations, their agents, servants, and employees, be restrained from making application to the defendants Ainsworth and Burriss, coal trustees as aforesaid, in their individual or official capacity, for the lease of said coal claim or discovery hereinbefore described or any part thereof, and that said defendants, Ainsworth and Burriss, be restrained from receiving such application to lease said premises and from forwarding the same to the inspector of the Interior Department, with a statement of facts thereunto pertaining, for the purpose of obtaining his authority to execute the same, and from forwarding the same to the Secretary of the Interior, at Washington, and that the court here and now issue its temporary writ or order so enjoining defendants, and that upon final hearing they have judgment against the defendants The Ola Coal & Mining Company, O. E. Woods, and James Elliott for royalties due them by virtue of the production of coal on said coal claim or discovery, as aforesaid, and that they have judgment making perpetual the injunction against all of said defendants, as herein prayed for, and for all such other and further relief as in equity and under the facts they may be entitled to, and for costs of suit in this behalf expended.

YANCEY LEWIS,
J. H. GORDON,
Attorneys for Plaintiffs.

35 "EXHIBIT A."

Be it enacted by the general council of the Choctaw nation assembled: There shall be appointed by the principal chief, by and with the advice and consent of the senate, one competent person, to be known as national agent of the Choctaw nation, whose duty it shall be to contract for the sale of stone, coal, and timber of all kinds. Said national agent shall be commissioned, and before he enters upon the duties of his office shall take the oath of office prescribed in the constitution, and enter into bond with good and sufficient securities in the penal sum of ten thousand dollars, payable to the Choctaw nation, conditioned that he will well and truly discharge his duties in accordance with law; which bond shall be filed in the national secretary's office. Said national agent shall hold his office for two years unless sooner removed by the principal chief for malfeasance in office.

2. Said national agent in making contracts with parties for the sale of any of the articles herein mentioned, shall charge royalty as follows:

On —, 25 cents per barrel of 240 pounds.
On coal, one-half cent per bushel.
On stone, ten cents per cubic yard.
On walnut timber, $5.00 per thousand feet.
On cypress timber, $3.00 per thousand feet.
On ash timber, $2.00 per thousand feet.
On oak and pine timber, $1.00 per thousand feet.
On cottonwood timber, 75 cents per thousand feet.

Telegraph poles.

Cedar, 4 to 5 inch deep, 8 to 10 inch bottom, 26 feet long, 40 cents each.
Cedar, 6-inch top, 12-inch bottom, 26 feet long, 50 cents each.
Oak, 6-inch top, 12-inch bottom, 26 feet long, 25 cents each.
Oak, 4 to 5 inch top, 8 to 10 inch bottom, 26 feet long, 20 cents each.
Piling, cedar, 2½ cents per foot, running measure.
Piling, oak, 1 cent per foot, running measure.

36 Railroad cross-ties (bridge, hewn or sawed).

Oak (post, burr, white, red and black) and pine, 7½ cents each.
Cedar, bois d'arc, walnut, mulberry, sassafras and red or slippery elm, 25 cents each.
Black locust and coffee bean, 12½ cents each.

Railroad switch-ties.

Oak (post, white and burr) 25 cents each; oak, (red and black) 15 cents each; pine, 10 cents each.
Tan-bark, 75 cents for every tree peeled.
Cord-wood, 20 cents per cord.
Shingles, pine, 25 cents per thousand; cypress, 30 cents per thousand.

The above royalty on timber, shingles, and tan-bark shall be due and payable on all manufactured in the Choctaw nation; and any other timber not mentioned above, the national agent is authorized to make contracts for, on the best terms obtainable, by and with the consent of the principal chief; and all timber contracted by the national agent to be measured by scale measurement, shall be measured according to Doyle's rule of Scribner's book, and the royalty collected accordingly; provided, however, that the national agent is hereby instructed to make all contracts for furnishing ties to railroads with Choctaw citizens exclusively. All contracts made hereunder shall expire on the 31st day of December of each year, except contracts for mining coal and quarrying stone, which shall cover a period of six years; and all royalty accruing under the same shall be due and payable monthly.

3. The national agent shall not sell any timber or stone on any citizen's claim except by the consent of such citizen; provided, however, that all royalties arising from the sale of either, whether

taken from the claims of individuals or from the public domain, shall be turned into the National Treasury.

Before contracting with parties who are non-citizens, the national agent shall require them to enter into good bonds of ten thousand dollars to the United States, to be approved by the United States Commissioner of Indian Affairs, and conditioned
37 upon their faithful compliance with their contracts, and all contracts herein provided for shall be executed in accordance with section 2103 United States Revised Statutes; and no non-citizens shall engage in any business contemplated by this act, except a contract be first made with the national agent, and a permit be also obtained according to the laws of the Choctaw nation.

5. No Choctaw citizen shall engage in any business contemplated by this act until they have first made contracts with the national agent in accordance with the law, and shall have made good and sufficient bonds to the Choctaw nation in the penal sum of five thousand dollars, to be approved by the national agent, and sent by said national agent to the national secretary's office for file; said bond to be conditioned upon the faithful compliance of said citizens with said contracts. All violators of this law shall be fined not less than two hundred and fifty dollars nor more than five hundred dollars in the discretion of the circuit court having jurisdiction, and upon the failure of said offenders to pay their fines in thirty days, they shall receive thirty-nine lashes on the bare back and be discharged from further obligations in the particular case; and district attorneys shall prosecute all persons indicted under this act, and if the fines are collected, said district attorneys shall receive one-tenth of the same for their services, and the balance shall be placed in the national treasury for public purposes.

The national agent shall have general supervision of the officers of inspector, district collectors and coal-weighers, and for that purpose he is hereby required to make frequent visits of inspection to the stations of the several coal-weighers, and see that their duties are properly performed; and if in his opinion a necessity therefor exists, to require the presence of the inspector and district collector at his office for explanations of their official acts and the
38 inspector and district collector shall make quarterly returns of all moneys collected by them to the national treasurer, and quarterly reports of the same to the national agent, with the sworn statement from the persons from whom the royalty was received; and the national agent shall examine the said reports and forward a quarterly abstract thereof to the principal chief for his information; and he shall also prepare an annual abstract of said reports and present the same with the quarterly report, and all vouchers thereto belonging, to the general council for examination and information.

7. In case of any irregularity in the office of inspector, district collectors, or coal-weighers, or of any material error or discrepancy in their reports, the national agent shall report the facts of the case, without delay, to the principal chief, and the national agent shall

also be required to visit the headquarters office of the railroad and coal companies and inspect their books and returns to ascertain if the report made to them correspond with the reports made to the Choctaw nation, and if it be necessary to obtain that power of inspection of said books and returns he shall insert a provision to that effect in their contracts.

8. The national agent shall receive for his services eight hundred dollars per annum, payable quarterly, upon the certificates of the principal chief to the auditor, who shall issue his warrants accordingly, and the treasurer shall pay the same, and said national agent shall not be allowed any funds besides his salary for contingent expenses.

39 "EXHIBIT B."

This contract, made and entered into in duplicate at Atoka, I. T., by and between W. H. Harrison, national agent of the Choctaw nation in behalf of said nation, commissioned as such by Green McCurtain, principal chief of the Choctaw nation, on the 24th day of October, 1896, in pursuance of an act of the general council of said nation approved November 5, 1880, and B. F. Byrd, national agent of the Chickasaw nation, in behalf of said nation, commissioned as such by R. M. Harris, governor of the Chickasaw nation, on the 11th day of September, 1896, in pursuance of an act of the Chickasaw legislature approved October 18, 1876, parties of the first part, and O. E. Woods, trustee, party of the second part, witnesseth:

That whereas said party of the second part desires to engage in the business of mining, prospecting and boring for coal within the limits of the Choctaw and Chickasaw nations, Indian Territory, it is hereby agreed by the parties of the first part that the party of the second part shall so engage on the condition that on all coal mined within said Choctaw and Chickasaw nations said party of the second part shall pay monthly to the properly authorized officers of the Choctaw and Chickasaw nations a royalty of one-half (½) of one cent per bushel of eighty-five pounds for all coal passing over a one-inch screen, said payment to be made during the month succeeding the month in which the coal is mined, and in the proportion of three-fourths to the Choctaw nation and one-fourth to the Chickasaw nation, to be applied under the direction of their respective governments to purposes of education and such other objects as may be best calculated to promote and advance the welfare and happiness of said nations and their people. In consideration of the sum thus to be paid, full and free permission is hereby given said party of the second part to do all and whatever may be

40 necessary for the successful mining and shipping of coal from mines in said Choctaw and Chickasaw nations, and protection is to be afforded to said party of the second part to the limit of the authority of the national agents aforesaid against interference or stoppage, and in the enjoyment of privileges herein granted; provided that the rights of individuals citizens shall be respected.

Said party of the second part shall provide suitable and conve-

nient facilities for weighing coal mined at all said mines that the weighers for said nations may ascertain the weights of all coal so mined. Said party of the second part shall give precedence to all orders of Choctaw and Chickasaw citizens and merchants and licensed traders in said Choctaw and Chickasaw nations for coal, over other persons, companies or corporations not resident in said Choctaw or Chickasaw nation, at the lowest regular prices at the mines or on cars or wagons for transportation, and shall also furnish coal to all Indians and authorized Indian traders in the Indian Territory to be shipped to any railroad station or other point in said Territory as the purchaser may require, filling all orders therefor according to the priority in the receipt of the same and at prices not exceeding the lowest regular price charged to other customers at the mines or on cars for transportation.

Said party of the second part shall furnish a bond in the sum of ten thousand dollars to the United States for the use and benefit of the Choctaw and Chickasaw nations, to be approved by the principal chief of the Choctaw nation and to be conditioned upon the regular and faithful observance of this contract and of the laws of the Choctaw and Chickasaw nations which are or may be applicable to said party of the second part during the existence of this contract.

In order to enable the national agents aforesaid to know that this contract is being lived up to, it is hereby further agreed that they shall have access to the books of said company in so far as
41 they show the quantity of coal mined. It is hereby agreed that the failure of the party of the second part to observe all the stipulations herein shall make this contract void. This contract shall be in force (to date from January 1st, 1897,) and shall expire by limitation on the 31st day of December, 1902.

In witness whereof, the said W. H. Harrison, national agent of the Choctaw nation, and —— ——, national agent of the Chickasaw nation, have by virtue of the hereinbefore-recited authority conferred upon us respectively by the Choctaw and Chickasaw nations, hereto subscribed our hands and affixed our private seals (there being no public ones) and in pursuance of a resolution of the Choctaw council passed on the 5th day of November, 1880, the corporate seal of said corporation is hereto affixed, and these presents duly signed by the president and secretary thereof, the first day of January, 1897.

W. H. HARRISON,
National Agent Choctaw Nation.
B. F. BYRD,
National Agent Chickasaw Nation,
By —— ——.

42 "EXHIBIT C."

Whereas there is a growing necessity for increase of the funds of the Choctaw nation to meet the demands of education and all elevating agencies; and whereas those minerals which are undiscov-

ered in the bowels of the earth can be of no possible benefit to the present or future generations unless they find development and are operated; therefore,

Be it enacted by the general council of the Choctaw nation assembled: That any citizen of the Choctaw nation who shall discover lead, iron or other metal, or mineral other than coal, shall be allowed the exclusive privilege of working the same within a radius of one mile from the point of discovery, provided that he shall duly record the same in the office of the county clerk of the county wherein the same metal or mineral may be located.

Provided further that he shall pay a royalty on the same to the Choctaw and Chickasaw nations of six per cent., three-fourths to the Choctaw and one-fourth to the Chickasaw nation of said six per cent. of the value of the metal or mineral when it is prepared for the general market; and provided further, that he shall be required to enter into contract with the national agent.

43 "EXHIBIT D."

This agreement, made and entered into this 8th day of December, 1896, by and between Loran Riddle, R. O. Edmonds, and Mike Gleason, citizens of the Choctaw nation, parties of the first part, and O. E. Woods, trustee, party of the second part,

Witnesseth, that the said parties of the first part for and in consideration of the sum of one dollar to them in hand paid, receipt of which is hereby acknowledged, and for other valuable consideration, has granted and leased, and does hereby grant and lease unto the party of the second part, his successors and assigns, their certain coal claim, located and described as follows, to wit:

The point of discovery being east of Wilburton at mile post 184, and about two hundred and fifty yards south of said mile post, the said coal claim and lease extending one mile in every direction from said point of discovery.

It is further understood and agreed that the said party of the second part shall have the exclusive right and privilege to mine and take coal from said claim, and that he shall have the right to erect such buildings and machinery, and shall have such inclosures as may seem and be deemed necessary for the benefit of the said party of the second part.

The said party of the second part further agrees to keep a true and correct account of all coal mined upon and taken from the claim above described, and pay to the party of the first part a royalty of one-fourth of one cent per bushel of eighty-five pounds on all coal taken from said claim which shall be passed over a one-inch screen; and that the party of the second part shall pay to the lawful authorities of the Choctaw and Chickasaw nations all royalties on coal as demanded by the laws of said nations.

That the parties of the first part for themselves, their heirs, executors and assigns, further agree that this lease shall be
44 for a period of six years, with privilege of renewal at the expiration of that time, and with the further privilege of

renewal on the same terms and conditions for five consecutive terms of six years each, provided always that said party of the second part shall faithfully perform the obligations and covenants of this agreement.

It is further understood and agreed by the party of the second part that he shall commence operations on said coal claim within ninety days from the signing of this agreement, and that in the event of the failure to begin operations within that time, the said party of the second part shall pay to the parties of the first part, royalty at the rate of one-fourth of one cent per bushel, on one car of coal, fifty thousand pounds to the car, for each day from the date of the expiration of the aforesaid ninety days to the beginning of work upon said claim, and up to the time that the output on said claim shall be one car, as aforesaid, or more. And that thereafter, royalty at the rate stipulated of one-fourth of one cent per bushel on all coal mined shall be paid to the party of the second part, his successors or assigns.

It is further agreed and understood that in the event work is not commenced upon said claim within six months after the signing of this lease, the lease shall become void and of no effect. It is further agreed that if work upon said claim shall cease for a period of six months, the said lease shall be considered foreclosed and revert to the owners of said claim. It is further agreed that the royalty shall be paid to the parties of the first part in equal amounts.

Witness our hands and seals this 8th day of December, 1896.

LORIN RIDDLE.
R. O. EDMONDS.
MIKE GLEASON.
O. E. WOODS, *Truslee*,
Per W. E. HAILEY, *Att'y.*

45 INDIAN TERRITORY, }
Central District. }

Before me, the undersigned authority, this day personally appeared W. H. Ansley, M. H. Gleason, and R. O. Edmonds, plaintiffs in the above-entitled cause, who, being by me first duly sworn, on oath depose and say that the matters and things stated in said complaint are true and correct as they verily believe.

W. H. ANSLEY.
M. H. GLEASON.
R. O. EDMONDS.

Subscribed and sworn to before me this 31st day of March, 1899.

BERTHA L. FREDERICK,
[SEAL.] *Notary Public.*

Endorsed: No. 2224. W. H. Ansley *et al. vs.* N. B. Ainsworth *et al.* Amended complaint. Filed in open court this 31st day of March, 1899. E. J. Fannin, clerk. Yancey Lewis, J. H. Gordon, att'ys for plaintiffs.

On January 20th, 1899, there was filed in the office of the clerk of said court, at South McAlester, a waiver of summons and entry of appearance by said defendants, which is in words and figures as follows, to wit:

In the United States Court, Central District, Indian Territory.

W. H. ANSLEY ET AL., Plaintiffs,
vs
N. B. AINSWORTH ET AL., Defendants.

Appearance.

On this day come the defendants, N. B. Ainsworth, L. C. Burriss, James Elliott, O. E. Woods, and The Ola Coal & Mining
46 Company, and, waiving summons herein, enter an appearance in the above-entitled cause and agree that the court may hear and determine the same and render final judgment upon the merits at the present term of this court.

N. B. AINSWORTH,
L. C. BURRISS,
By JOHN H. WILKINS,
United States Attorney, Representing said Defendants ex Officio.
JAMES ELLIOTT,
O. E. WOODS,
OLA COAL & MINING COMPANY,
By W. J. HORTON, *Their Attorney.*

Endorsed: 2224. W. H. Ansley *et al. vs.* N. B. Ainsworth *et al.* Entry of appearance. Filed in open court Jan'y 20th, 1899. E. J. Fannin, cl'k.

On the 31st day of March, 1899, there was filed in said cause in the office of the clerk of said court a demurrer by the defendants, which is in words and figures as follows, to wit:

In the United States Court, Central District, Indian Territory.

W. H. ANSLEY ET AL.
vs.
N. B. AINSWORTH ET AL.

Demurrer.

Now, on this day, come the defendants, N. B. Ainsworth, L. C. Burriss, James Elliott, O. E. Wood, and The Ola Coal & Mining Company, and demur to the amended complaint herein, and for grounds therefor say:

47 First. That the complaint does not state facts sufficient to constitute a cause of action.

Second. That the complaint does not state facts sufficient to constitute an equitable cause of action.

JOHN H. WILKINS,
United States Attorney, Representing Coal Trustees ex Officio.
W. J. HORTON,
Attorney for Ola Coal & Mining Company.

Endorsed: 2224. W. H. Ansley *et al. vs.* N. B. Ainsworth *et al.* Demurrer. Filed in open court this 31st day of March, 1899. E. J. Fannin, cl'k.

On March 31st, 1899, the same being a day of the regular December, 1898, term of said court, among the proceedings had were the following:

Decree.

W. H. ANSLEY ET AL., Plaintiffs,
vs.
N. B. AINSWORTH ET AL, Defendants. } No. 2224.

On this 31st day of March, 1899, the above-entitled cause came regularly on for hearing, the defendants, N. B. Ainsworth, L. C. Burriss, O. E. Woods, James Elliott, and The Ola Coal & Mining Company, having heretofore entered their appearance and agreed that the cause might be heard and finally determined at the present term of court.

Plaintiffs, by leave of court first obtained, filed an amended complaint herein, and defendants filed demurrer thereto.

48 The court, after hearing argument of counsel for plaintiffs and defendants respectively and being fully advised in the premises, is of opinion that plaintiffs' amended complaint is without equity, and doth sustain defendants' demurrer to same; and plaintiffs declining to plead further herein, it is by the court considered, ordered, adjudged, and decreed that said amended complaint, wherein W. H. Ansley, M. H. Gleason, and R. O. Edmonds are plaintiffs and N. B. Ainsworth, L. C. Burriss, O. E. Woods, James Elliott, and The Ola Coal & Mining Company are defendants, be, and the same is hereby, dismissed; and it is further considered, adjudged, and decreed by the court that defendants have and recover of plaintiffs their costs in this behalf expended, for which they may have execution; to which action of the court in sustaining said demurrer and entering this decree plaintiffs in open court except.

49 (*Assignment of Errors.*)

In the United States Court for the Central District of the Indian Territory, at South McAlester.

W. H. ANSLEY ET AL., Plaintiffs,
vs.
N. B. AINSWORTH ET AL., Defendants. } No. 2224.

Assignment of errors.

The plaintiffs in this action, in connection with their petition for appeal, file the following assignment of errors, which they aver occurred upon the trial of this cause and in the decree rendered therein, to wit:

First. The court erred in holding that the amended complaint in this cause does not state facts sufficient to constitute a cause of action.

Second. The court erred in holding that the amended complaint in this cause does not state facts sufficient to constitute an equitable cause of action, and in holding that the amended complaint in this cause is without equity.

Third. The court erred in sustaining the demurrer of the defendants to plaintiffs' amended complaint.

Fourth. The court erred in rendering judgment in favor of the defendants in this cause upon the demurrer filed herein.

YANCEY LEWIS AND
J. H. GORDON,
Attorneys for Plaintiffs.

Endorsed: W. H. Ansley *et al. vs.* N. B. Ainsworth *et al.* Assignment of errors. Filed September 19, 1899. E. J. Fannin, clerk.

(*Petition for Appeal.*)

In the United States Court for the Central District of the Indian Territory, at South McAlester.

50 W. H. ANSLEY, M. H. GLEASON, and R. O. EDmonds, Plaintiffs,
vs.
N. B. AINSWORTH, L. C. BURRISS, O. E. WOODS, JAMES Elliott, and Ola Coal & Mining Company, Defendants. } No. 2224.

Petition for appeal and order granting same.

The plaintiffs in the above-entitled cause, deeming themselves aggrieved by the decree made and entered in said cause on the 31st day of March, 1899, hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the asssignment of errors filed herewith, and pray that this appeal may be

allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

YANCEY LEWIS AND
J. H. GORDON,
Attorneys for Plaintiffs.

The appeal prayed for in the foregoing application is allowed and bond for costs fixed at $300.00 this 19 day of September, 1899.

WM. H. H. CLAYTON,
Judge of the United States Court for the Central District of the Indian Territory.

Endorsed: No. 2224. W. H. Ansley *et al. vs.* N. B. Ainsworth *et al.* Petition for appeal. Filed September 19, 1899. E. J. Fannin, clerk. Lewis & Gordon, att'ys for plaintiffs.

(*Bond on Appeal.*)

In the United States Court for the Central District of the Indian Territory, at South McAlester.

51 W. H. ANSLEY ET AL., Plaintiffs,
vs.
N. B. AINSWORTH ET AL., Defendants. } No. —.

Bond on appeal.

Know all men by these presents that we, W. H. Ansley, M. H. Gleason, and R. O. Edmonds, as principals, and Allen Wright, Harry J. Bettes, and James H. Gordon, as sureties, residents in the central district of the United States court for the Indian Territory, are held and firmly bound unto N. B. Ainsworth, L. C. Burriss, O. E. Woods, James Elliott, and the Ola Coal & Mining Company in the sum of three hundred dollars, to be paid to the said N. B. Ainsworth, L. C. Burriss, O. E. Woods, James Elliott, and the Ola Coal & Mining Company; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 19 day of September, A. D. 1899.

Whereas the above-named W. H. Ansley, M. H. Gleason, and R. O. Edmonds, as principals, have perfected an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the United States court for the central district of the Indian Territory, sitting at South McAlester:

Now, therefore, the condition of this obligation is such that if the above named W. H. Ansley, M. H. Gleason, and R. O. Edmonds shall prosecute said appeal to effect and answer all damages and

costs if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in fully force and virtue.

52

W. H. ANSLEY,
M. H. GLEASON,
R. O. EDMONDS,
By YANCEY LEWIS AND
J. H. GORDON,
Their Attorneys.
ALLEN WRIGHT.
HARRY J. BETTES.
JAMES H. GORDON.

Sealed and delivered in the presence of—
E. T. BRADLEY.
O. H. GALBRAITH.

Approved by—
WM. H. H. CLAYTON,
Judge of the United States Court for the Central District of the Indian Territory.

Endorsed: No. 2224. W. H. Ansley *et al. vs.* N. B. Ainsworth *et al.* Bond on appeal. Filed September 19, 1899. E. J. Fannin, clerk. Lewis & Gordon, att'ys for plaintiffs.

(*Citation.*)

THE UNITED STATES OF AMERICA, *ss:*

To N. B. Ainsworth, L. C. Burriss, O. E. Woods, James Elliott, and the Ola Coal & Mining Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, on the 19 day of October, 1899, pursuant to an appeal filed in the clerk's office of the United States court for the central district of the Indian Territory, sitting at South McAlester, Indian Territory, wherein W. H. Ansley, M. H. Gleason, and R. O. Edmonds are appellants and N. B. Ainsworth, L. C. Burriss, O. E. Woods, James Elliott, and The Ola Coal & Mining Company are appellees, to show cause, if any there be, why the judgment rendered against the said

53 appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in their behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 19 day of Sept., in the year of our Lord one thousand eight hundred and ninety-nine.

WM. H. H. CLAYTON,
Judge of the United States Court in and for the Central District of the Indian Territory.

I hereby accept service of the within citation this 19 day of September, 1899.

N. B. AINSWORTH,
L. C. BURRISS,
By J. H. WILKINS,
U. S. Att'y, Representing said Appellees ex Officio.
JAMES ELLIOTT,
O. E. WOODS,
OLA COAL & MINING COMPANY,
By W. J. HORTON, *Their Attorney.*

Endorsed: No. 2224. W. H. Ansley *et al. vs.* N. B. Ainsworth *et al.* Citation. Filed September 19, 1899. E. J. Fannin, cl'k. Lewis & Gordon, att'ys for plaintiffs.

UNITED STATES OF AMERICA, }
Central District of the Indian Territory. }

I, E. J. Fannin, clerk of the United States court for the central district of the Indian Territory, do hereby certify that the foregoing is a true and correct transcript of the record, proceedings, and papers filed in my office in the case of W. H. Ansley *et al. versus* N. B. Ainsworth *et al.*, which case has been appealed to the Supreme Court of the United States by the claimants herein.

54 In testimony whereof I have hereunto set my hand and seal of office, at South McAlester, in said district, this 23d day of September, A. D. 1899.

{ Seal United States Court in the Indian Territory, Central District. }

E. J. FANNIN, *Clerk.*

55 In the Supreme Court of the United States.

W. H. ANSLEY, M. H. GLEASON, and R. O. Edmunds, Appellants,
vs.
N. B. AINSWORTH, L. C. BURRISS, and OLA Coal and Mining Company, Appellees.
} No. —. Stipulation.

It is agreed that the accompanying opinion is a true and correct copy of the opinion filed by the judge of the United States court for the central district of the Indian Territory upon the trial of the above-entitled cause in said court, and that the same may be attached to and made a part of the record of said cause now on file in the Supreme Court by the clerk of said court, and that the same may be printed as a part of the record in said cause.

Witness our hands this 18th day of January, 1900.

YANCEY LEWIS,
J. H. GORDON,
Attorneys for Appellants.
W. J. HORTON AND
J. W. McLOUD &
J. H. WILKINS, *U. S. Attorney,*
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56 In the United States Court for the Central District of the Indian Territory.

W. H. ANSLEY, M. H. GLEASON, and R. O. EDMUNDS, Complainants,
vs.
N. B. AINSWORTH, L. C. BURRIS, and OLA COAL & MINING CO., Defendants.

Opinion.

CLAYTON, *Judge:*

The facts of this case as set out in the complainants' bill, so far as is necessary to state them, are: That the plaintiffs, who are citizens of the Choctaw nation, on the 7th day of November, 1890, prospected for and discovered, at great expense to themselves, the coal claim or mine in controversy, and did open the same and have ever since either operated or caused the same to be operated and worked; that at the time of their discovery no person was living upon or claiming any right to the possession of the tract claimed by them, nor had any coal theretofore been found or discovered upon it.

That afterward, to wit, on the 8th day of December, 1896, the plaintiffs by their written agreement, which is made an exhibit to the bill, did lease the said coal claim to the defendant O. E. Woods for a period of six years, with right of renewal, upon the terms of the original lease, for five consecutive times, and that the said O. E. Woods thereafter, by an arrangement and agreement with the defendant Ola Coal & Mining Company, authorized said company to mine coal within the limits of the said coal claim.

That the other defendants, Messrs. Ainsworth and Burris, are coal trustees, appointed by the President of the United States by virtue of and in accordance with an act of Congress entitled "An act for the protection of the people of the Indian Territory, and for other purposes," approved June 8, 1898. So much of this act as is necessary for the purposes of this case is set out and pleaded in the plaintiffs' bill, which, among other things, avers that the defendants
57 Wood and The Ola Coal and Mining Company, disregarding the right of plaintiffs, are about to enter into a contract with the said trustees for the lease of the aforesaid coal claim, as provided for in the said act of Congress, and that the said trustees are about to receive and accept the same and forward it to the Secretary of the Interior for his approval, and thereby to cast a cloud on the title of plaintiffs to and in the said coal claim, and, in effect, to divest from them their right and title to the same, and they pray for an injunction restraining defendants from entering into the said contract of lease.

The plaintiffs base their title on sec. 18 of art. VII of the constitution of the Choctaw nation, which is as follows:

"Any citizen of this nation who may find any mine or mines, or mineral water, shall have exclusive right and privilege to work the same, so long as he may choose, within one mile in any direction

from his works or improvements, provided, however, he does not interfere with the rights of the former settler."

The plaintiffs contend, first, that by virtue of the aforesaid provision of the constitution of the Choctaw nation and certain acts of the legislature of that nation, hereafter to be noticed, and the laws of the United States and the treaties of the General Government with the Choctaw nation they obtained in and to this mine a vested right, and that the aforesaid act of Congress, by virtue of which the new lease is attempted to be made, is as to them and their rights unconstitutional, because if carried into effect it will divest them of this vested right to operate it so long as they may choose to do so.

They contend, second, that the act of Congress of June 8, 1898, commonly known as the Curtis bill, was not constitutionally enacted, in this, that by engrafting into the act of Congress what is known as the Atoka agreement and submitting the question of its ratification to a vote of the Choctaw people, so that in the event it should be ratified by them it should stand as the law as a
58 part of that act, and in the event it should not be so ratified that it should be expunged from the act, and the statute without the provision of the agreement should stand as the law, was in effect to delegate the legislative power of Congress to the Choctaw people.

Their third contention is that that act, stripped of the Atoka agreement, would have the effect of taking from the Choctaw people their government and many of their most cherished and sacred rights as theretofore exercised and enjoyed by them, and that the Atoka agreement was not satisfactory to them, but because of the fact that the only alternative presented to them was to accept the one or the other they were coerced into accepting that which was to them the least objectionable; that the agreement having been presented to them for their acceptance or rejection, with the condition that if rejected the Curtis bill, with, to them, all its objectionable features, would without their consent be forced upon them, was such a coercive act upon the part of Congress as to render its ratification void when done under these circumstances.

I will consider these questions in inverse order from that stated above.

The demurrer concedes the allegation that Congress passed the act of June 8, 1898, for the purpose of coercing the people of the Choctaw nation into ratifying the Atoka agreement, and that thereby, acting under this coercive influence, the people by their votes ratified this agreement when they otherwise would not have done so. Does this render the agreement void? Without passing upon the question as to whether the facts stated would amount to such duress as that it would avoid the agreement, considering it as a contract between individuals, after a full consideration of the authorities, I am of the opinion that in this kind of a case the court cannot go behind the act of Congress to inquire into the question whether or not it was procured by duress or fraud and declare it inop-
59 erative for that reason. There is no general law investing courts with this power, and it can only be done in special

cases when by an act of Congress it has disclaimed its decision as a political question for the legislative department to decide and has enjoined it upon the courts as one purely judicial. U. S. *v.* Arredonda, 31 Pet., 691.

In the case of The United States *v.* Old Settlers, etc., 148 U. S., 466, the court was asked to go behind and annul a treaty on the ground of fraud and duress in its execution. Chief Justice Fuller, speaking for the court, after reviewing the case of The United States *v.* Arredonda, *supra*, says:

"It will be perceived that that decision is not authority for the proposition that a court may be clothed with power to annul a treaty on the ground of fraud or duress in its execution; nor does any such question arise in the case before us. There is nothing in the jurisdictional act of February 25, 1889, inconsistent with the treaty of 1846 (or any other), and nothing to indicate that Congress attempted by that act to authorize the courts to proceed in disregard thereof. Unquestionably a treaty may be modified or abrogated by an act of Congress, but the power to make and unmake is essentially political and not judicial, and the presumption is wholly inadmissible that Congress sought in this instance to submit the good faith of its own action or the action of the Government to judicial decision by authorizing the stipulation in question to be overthrown upon an inquiry of the character suggested, and the act does not in the least degree justify any such inference."

The courts have no general power to question the *bona fides* of an act of Congress. If such power existed, it would necessarily devolve upon the courts to take proof and inquire into the motives and the conduct of individual members of that department of the Government to ascertain whether or not members of Congress in advocating this measure or that, and in casting their votes, were actuated by good or bad motives. Of course, in a government like ours, with its co-ordinate and independent departments, this could not be tolerated. The legislative department of the Government is so far independent of the judicial department that its
60 motives for its legislative acts, if otherwise valid, cannot, without its express consent, be inquired of by the courts for the purpose of annul-ing them in any of their provisions. I conclude, therefore, that this court has no power conferred upon it to determine the question whether the Atoka agreement would or would not have been ratified by the Choctaw people but for the provision of the act of Feb. 8, 1898. The courts must presume that the act was passed lawfully, and cannot impugn the motives of Congress.

But if it were conceded that the agreement is void because of duress, or for any other reason in the procurement of it, the plaintiffs in this case would be in no better attitude than if it were held to be valid, because that part of the act embraced in the agreement was the only thing submitted to the Choctaws and Chickasaws for their approval or rejection; and it being a separate and independent part of the statute, the act is divisible, so that if the agreement is held to be unconstitutional and void because it was procured by duress or

because not constitutionally enacted, the other part of the act not tainted with this vice, being whole and complete in itself and not dependent upon the agreement in any of its parts, would still remain as the law. To show that the act is divisible, and that the agreement is distinct and separate from the other parts of the act, it is only necessary to consider that the agreement, with the other parts of the statute not in conflict with it, was to be the law if ratified, and if not ratified the original act stripped of the agreement was to be the law. It presented two distinct systems—the one applicable to a state of facts which might be brought into existence only by the consent of the Choctaw and Chickasaw people; the other applicable to the then existing conditions, and which, without their consent, would necessarily continue to exist. If the act applicable to one of these conditions is unconstitutional and void, and the other is valid, the whole act will not fall because of that;
61 that which is valid will be declared to be the law. Cooley Const. Lim., 211–214.

The plaintiffs seek to enjoin the defendants from leasing certain coal mines to which they claim title, and if they have not a vested right in and to the mines the Atoka agreement, if valid, divests them of whatever claim they may have, and the lease would be lawful. But the 13th, 16th, and 18th sections of the original act has the same effect. By the 16th and 18th sections it is made a misdemeanor for any one to demand or receive or to pay royalties on coal except into the United States Treasury for the use of the whole tribe. The statute as clearly and as certainly divests the plaintiffs of their claim to the mines as does the agreement, and unless he is in an attitude to show that both are void or that for other reasons they do not apply to his case he is without grounds to maintain his suit.

And this applies as well to the second contention, that the agreement is void because of the fact that it was submitted to the two tribes for their ratification, Congress thereby delegating its legislative power to them. If this were conceded, it would not help the plaintiffs' case because it was only the agreement that was submitted, and that would be the only part of the statute which would be affected by the unconstitutional method of its passage, and, as before stated, if it should be declared void, the balance of the statute would stand, and as it contains the same provisions, as far as they pertain to this case, the plaintiffs' title would be left in the same condition as if the agreement were valid.

But I am of the opinion that under all of the circumstances of this legislation the mere fact that the agreement, after amended and ratified by Congress and engrafted into the act, was submitted to the two tribes for their ratification, was not such a delegation of the legislative powers of Congress as to render it void.

Taking the statute as a whole, it was the evident intention of Congress, first, to secure a partition of the lands of the two tribes
62 to their individual members; secondly, to establish and provide municipal government for cities and towns and to secure title to the inhabitants to the lands on which their homes and busi-

ness houses should be built; and, third, to place the coal and other minerals of the tribes in the hands of an officer of the Federal Government, to be managed and controlled by him, to the end that there might be a fair and equal distribution of this source of wealth among the people of these nations.

Because of the title and tenure by which these Indian lands were held, this legislation was impossible without their consent. They hold their lands by a fee-simple title. They hold them by a tenancy in common. Congress had no constitutional power to say to them, "You shall partition your lands and change the tenure of your holdings." It could not require them to sell to white men the lands to be embraced within the limits of the contemplated cities and towns, nor could it take from them the custody and control of their mines. Before this could be done their consent, because of the title to their realty, was an absolute necessity. It was an event that must happen before any law that Congress might pass to this end could have any constitutional force. An agreement, substantially the one engrafted in the act, had already been drafted and agreed to by commissioners fully authorized by the Government of the United States and these two Indian nations. It, however, had not been ratified by either. Congress, looking forward to a consummation of its purposes, amended the agreement in a few unimportant particulars, and as thus amended ratified it and engrafted it into the act and passed it into a law. In this act the legislative will of Congress was fully and completely expressed, and there was nothing left to prevent it from becoming operative as a law but a certain impediment over which Congress had no control and which could only be removed by the Indians themselves by a vote of their people. This impediment was not the necessity that they should consent to the legislation,

but that before such legislation could become operative they
63 should consent to a change of the tenure and title by which

they held their lands, and a surrender of the custody and control of their mines, which, under the scheme, they were to do by a ratification of the agreement. This title to their lands of the Indians of the five civilized tribes has for many years stood up as an impregnable barrier against needed and desired legislation. Every time that Congress would attempt to legislate in relation to the condition here it would run up against it and find itself thwarted. The whole object of the agreement was to place the title in such a condition as that this legislation could be had. The power conferred by Congress on the commission to the five civilized tribes to bring about this agreement was for this purpose. Congress, by act of March 3, 1871, had divested these Indian tribes and the United States of the power to regulate these matters by treaty, and had left it solely in the hands of Congress. Had the agreement been executed by treaty, as it could have been done before the passage of the aforesaid act, and before its ratification Congress, anticipating that it would be done, had passed the act dependent upon the ratification of the treaty, to go into effect if ratified, and if not to be void as a statute, there is no doubt but that it would have been lawful

This has often been done by Congress in its dealings with foreign nations, and its power to do so has always been upheld. Since the right to agree by treaty has been taken away from them and all of these matters have been submitted to Congress, why may it not pursue the same course.

The matter referred to the Indians was one solely within their power to determine. Congress could not constitutionally divest them of the title to or control over their realty; this was a necessity, however, in order that the legislation should take effect. Congress having no legislative power to do this, how can it be said that it delegated its legislative powers by referring the question to those in whom it alone vested? A power that does not exist cannot
64 be delegated. The ratification of the agreement was not a legislative act. Congress could not do it for them; they must do it for themselves. The act of ratification was simply contractual; it was the culmination of long-pending negotiations between them and the Federal Government. While it is true that it had the effect of giving force to a statute and subjecting them to its operation, which would otherwise have been nugatory, yet the thing submitted to them was the agreement and not the statute. Would they enter into the contract? If so, the statute would become operative as to them. If not, it would not.

Congress was legislating in view of the contingency that they would consummate the agreement that it, Congress, had already agreed to, and when this should be done there would be such a change of circumstances as would give to it the right to look forward, and, in anticipation of the happening of the event, to legislate in view of that contingency.

Legislation of a conditional character, when its force is to depend upon the happening of some future event or upon some future change of circumstances, is not unconstitutional.

"The event or change of circumstances on which a law may be made to take effect must be such as, in the judgment of the legislature, affects the question of the expediency of the law—an event on which the expediency of the law in the opinion of the lawmakers depends. On this question of expediency the legislature must exercise its own judgment definitively and finally. When a law is made to take effect upon the happening of such an event, the legislature in effect declare the law inexpedient of the event should not happen, but expedient if it should happen. They appeal to no other man or men to judge for them in relation to its present or future expediency. They exercise that power themselves, and then perform the duty which the Constitution imposes upon them." Cooley Const. Lim., 144.

In view of this legislation, what greater change of circumstances could possibly have occurred than that which happened by the ratification of the agreement?

65 The language of the act submitting the agreement to a vote of the people is as follows:

Section 32, which is the last section of the act, except one, which

by similar language submits an agreement to the Creeks for their ratification, provides:

"That the agreement made by the commission to the five civilized tribes with the commissioners representing the Choctaw and Chickasaw tribes of Indians on the twenty-third day of April, 1897, as herein amended, is hereby ratified and confirmed, and the same shall be of full force and effect, if ratified before the first day of December, 1898, by a majority of the whole of the votes, etc." Then follows the directions for the election. And the act further declares: "And if said agreement, as amended, be so ratified, the provisions of this act shall apply only to said tribes where the same shall not conflict with the provisions of said agreement."

That is, in the event that the agreement shall be ratified by a certain date, and it could only be ratified by a vote of the people, those parts of the act in conflict with it should not apply to them; otherwise to be in force. The vote was simply a method, and the only one open to the parties, of consummating the agreement.

"If an act is adopted by the legislature as a law, and, pursuant to its provisions, it is submitted to the people, and on their expression of approval or disapproval, as a fact or event, the act by its terms does or does not take effect, or takes effect at one particular date rather than another, then apparently the only question is whether the legislature can pass a law to take effect on such a contingency. The authorities would seem now to have established the doctrine, though not universally, that the result of a popular vote is a contingency on which laws may be enacted to take effect." Suth. Stat. Const., 76, '7.

But there is another reason why, in my opinion, the agreement may be maintained as a valid law, even though its only contingency is its acceptance or rejection by the Choctaw and Chickasaw people. It is this: The agreement, considered as a statute, is special and not general. It is local in its application. It affects only the people of these nations who live within the limits of a specified territory, a small portion of the Indian country. It preserves to them the existence of their government and limits its duration. It changes the title by which they hold their lands. It takes from their custody and control the interests in their coal and minerals and applies the funds arising from them to the maintenance of schools for the education of their children. It takes away from them, in many instances, the right to be tried in their own courts for crimes committed against their own government and in many other ways affects them locally. They are quasi foreigners to the people of the United States and have no voice in the enactments of the legislature of the Federal Government which governs them. If under any circumstances an act of Congress affecting a locality can be made subject to be accepted or rejected by a vote of the people to be affected, it seems clear to me that it ought to apply here.

"It is now settled that laws, at least of local application, may be imperative or permissive. They may authorize the people of cities, villages, townships, counties, groups of counties, or other limited

districts, not otherwise defined than for the purposes of such acts, to determine for themselves local questions of police, taxation, or any other matter affecting their local welfare, and the law may be conditioned to carry into effect their determination or option. They have thus been authorized to decide by popular vote and execute their decision to contribute for the building of railroads or other like public improvements; to divide a county or organize a new one; to establish or remove a county-seat; whether there shall be license or prohibition of the liquor traffic; whether paupers shall be a county or a township charge; whether they will have a system of free schools; whether domestic animals shall be permitted
67 to run at large. The people locally interested may have the option to accept or reject a municipal charter or amendatory acts or local police law. Acts giving such local options have not unfrequently been framed to secure it by making a new law go into effect or not, according to the result of a popular vote." Suth. Stat. Const., 80. And he cites many authorities.

It seems to me that under the facts and circumstances peculiar to these tribes of Indians and to this legislation, remembering that the desired legislation could not have been had without the consent of such tribes, and that that consent could only have been procured by a popular vote; that the statute, or that part of it which was submitted to their vote, was special, pertaining only to their local affairs, affecting only their rights, changing in important particulars their very form of government and the tenure by which they held their lands, changing and abrogating contracts which in the form of solemn treaties then existed between them and the United States, considering that they constitute a quasi sovereignty, but without any right or power to participate in the enactment of these laws which were to so vitally affect them and their interests, if in any case the contingency of a popular vote may be made an event upon which a statute may or may not take effect, this case should come within that rule.

I therefore hold that the statute is not void because of the fact that the agreement was submitted to a vote.

Having decided, then, that the Atoka agreement was constitutionally enacted into a law, the only question left for consideration is, is that part of it which has the effect of divesting the plaintiff of his right to hold the mine in controversy, to which he claims title, unconstitutional? As before stated, he claims title by virtue of sec. 18, art. 7, of the Choctaw constitution, which is as follows:

"Any citizen of this nation who may find any mine or mines, or mineral waters, shall have exclusive right and privilege to work the same, so long as he may choose, within one mile in any
68 direction from his works or improvements; provided, however, he does not interfere with the rights of the former settler."

After full investigation, I have held in the case of Amos *v.* Choctaw Nation, a citizenship case, that the Choctaw and Chickasaw people hold their land in common by a fee-simple title; but in the consideration of the effect to be given to the above provision of the

Choctaw constitution I do not consider it material whether the title is in the Choctaw people or in the tribe. In either event I think that the provision would be binding, because, if in the nation, it is their act, and if in the individual members of the tribe, the constitution, with this section included in it, having been submitted to their vote and adopted and confirmed by them, they would be bound by it as a contract or agreement between themselves as owners in common of the lands. The plaintiff, being one of these tenants in common, would take all that the Choctaw nation and Choctaw people could and did convey by this section of their constitution.

It is conceded that the plaintiff has performed all of the conditions necessary to acquire in and to this mine whatever rights this constitutional provision was intended to legally convey, and if this right so acquired is a vested one, notwithstanding the very large and extended powers which Congress or the General Government may have over these Indians and their property, I hold it has no power to divest a vested right relating to their lands, rights heretofore secured to them by acts of Congress, solemn treaties and deeds from the United States granting to them the lands for a valuable consideration and by fee-simple title. The argument that because of the almost absolute power of the United States to govern and control these Indians; that because the Federal Government is their guardian and they its wards it may take from them their vested rights without due process of law, I cannot deem sound. Since the act of Congress of March 3, 1871, these Indian tribes can no
69 longer enter into treaties with the United States, but are to be governed by Congress—that is, by law—and the highest law both to Congress and these Indians is the Constitution of the United States, which provides that "no person shall be deprived of life, liberty, or property without due process of law."

The question then is, did the plaintiff, by virtue of his discovery and his possession and operation of this mine in accordance with the aforesaid section of the Choctaw constitution, acquire a vested right to it? And this depends upon the answer to two others: First, was there any condition or limitation to the Choctaw title to prevent them from vesting in the plaintiff such a title; and, second, if so, have they, by the terms of the constitutional provision or by any other legal act, done so?

As to the title of the Choctaws: The first treaty relating to the cession by the United States of this land to the Choctaws was had on Oct. 18, 1820, 7 U. S. St. L., 210. The first article of the treaty cedes to the United States certain lands in Mississippi, and the second article provides:

"For and in consideration of the foregoing cession, on the part of the Choctaw nation, and in part satisfaction for the same, the commissioners of the United States, in behalf of said States, do hereby cede to said nation a tract of country west of the Mississippi, situate between the Arkansas and Red rivers, and bounded as follows." Then follows the description.

On the 18th day of May, 1830, Congress passed the following act:

"SEC. 3. And be it further enacted: That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made that the United States will forever secure and guaranty to them and their heirs or successors the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them
70 for the same; provided always that such lands shall revert to the United States if the Indians become extinct or abandon the same."

On September 27, 1830, the United States and the Choctaw nation entered into another treaty, the second article of which is as follows:

"Article II. The United States, under a grant specially to be made by the President of the U. S. shall cause to be conveyed to the Choctaw nation a tract of country west of the Mississippi river, in fee-simple to them and their descendants, to inure to them while they shall exist as a nation and live on it." 7 U. S. St. L., 333.

On March 23, 1842, a patent was executed to the Choctaws for their lands by the United States, the granting clause of which is as follows:

"Now, know ye, that the United States of America, in consideration of the premises and in execution of the agreement and stipulations of the aforesaid treaty (1830) have given and granted and by these presents do give and grant unto the said Choctaw nation, the aforesaid tract of country west of the Mississippi, to have and to hold the same, with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, as intended to be conveyed by the aforesaid article in fee-simple to them and their descendants to inure to them while they shall exist as a nation and live on it, liable to no transfer or alienation except to the United States, or with their consent."

It has been held, and I think properly, that the act of Congress, the treaty, and the patent conveyed a fee-simple title, notwithstanding the limitation upon alienation; that this limitation simply had the effect to debase the fee and not to destroy it; but whether it was intended to convey the fee to the parties as a body corporate or to the individual members there is perhaps some doubt, but by the treaties of 1855 and 1860 the intention of the parties is made clear.

Art. 1 of the treaty of 1855, after defining the boundaries of the Choctaw and Chickasaw nations, provides as follows:

"And pursuant to an act of Congress, approved May 28, 1830,
71 the United States do hereby forever secure and guarantee the lands embraced within said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to hold in common, so that each and every member of either tribe shall have an equal undivided interest in the whole. Provided, however, no part thereof shall ever be sold without the consent of both tribes, and that

said lands shall revert to the United States if said Indians and their heirs become extinct or abandon the same."

Art. 11 of the treaty of 1866 in part provides:

"Whereas the land occupied by the Choctaw and Chickasaw nations, and described in the treaty between the United States and said nations of June 22, 1855, is now held by the members of said nation in common," etc. Whether the treaty of 1855 be taken as an interpretation of the terms of the grant made by the parties to it or as the engrafting of a new condition in it is immaterial, because, in any view of the case, after the execution of that treaty its terms would be binding. Theretofore the United States had been treating with the Choctaws alone in relation to their lands. Now a new party in interest appears. The Chickasaws, with the consent of the United States, had bought an interest in them, and it became necessary to define the rights and title of all.

I think there can be no doubt but that these Indians hold their lands as tenants in common, at least since the treaty of 1855; but by that treaty the United States is made to guarantee to each Indian an enjoyment of an equal undivided share of these lands, and the Choctaws agree with the Chickasaws that it shall be done.

The constitution, containing the provision by virtue of which the plaintiff claims title, was not adopted until 1860, five years after the treaty of 1855 was ratified, and neither the United States nor the Chickasaw nation were parties to it.

72 The United States had the right, by virtue of its superior sovereignty over these Indian tribes and its guardianship over their wards, which has always been recognized, to make such an agreement with them and enforce it.

If the 18th section of art. VII of the Choctaw constitution was intended to vest an indefeasible title to the coal mines in the discoverer, it would be in violation of two of the provisions of the treaty of 1855. First, it would be an appropriation and a sale of the realty without the consent of the Chickasaws; and, second, it would be in violation of that clause of the treaty which provides that the lands shall be held in common, so that each and every member of either tribe shall have an equal, undivided interest in the whole.

There is no limitation in the constitution as to the number of mines which a discoverer may own and appropriate to himself. The language is, "Any citizen of this nation who may find any mine or mines, etc.," clearly giving to him the use of all he may discover. The records of the clerk's office of this court discloses that three of the most influential members of the Choctaw nation, all high officers of the government, on one day executed to a St. Louis coal company twenty-eight leases of coal claims, each of the twenty-eight embracing a circular area of land the diameter of which was two miles, about 2,000 acres each, and this probably did not include one-half of their claims. If one man should acquire them all his title to the whole would be as perfect as if he had discovered but one. Diamond drills have been run into nearly all of the coal lands of this nation, and wherever the drill would discover

coal in paying quantities the holes have been named in their paper claims and leases as monuments marking the center of each two-mile claim. Of course, this is going out of the record, for these facts are not in proof, but I merely mention them to show what the contention of the plaintiff leads to and how gravely this interpretation of the Choctaw constitution would be at variance with
73 art. 1 of the treaty of 1855, and the treaty between the United States and the Choctaws and Chickasaws having been adopted prior to the Choctaw constitution, if they conflict, the terms of the treaty must prevail; and if it be true that it was intended by this article of the constitution to convey an indefeasible title to the discoverer, so that he may hold the realty for all time against the will of the other tenants in common and of the Chickasaw nation and the United States, there is a conflict between it and the treaty.

I therefore hold that if the language of the constitution is to be construed as granting to the discoverer of mines in the Choctaw nation an indefeasible title or right to the mine discovered by him as to the underlying coal, it is void as being in conflict with the treaty of 1855. I do not deem it necessary to consider the question whether this constitutional provision was intended to convey the title to the mines or merely to grant to the discoverer a license, revocable or irrevocable, for the result would be the same. For the same reason that the Choctaw nation could not convey the title to its mines, it could not grant a license irrevocable to mine the coal. Both would be in violation of its obligations as provided by the treaty, and if it were a mere license revocable at its will the Choctaw people, the owners of the realty, by entering into the Atoka agreement, has but exercised its power of revocation.

A contract, although in writing, giving the right to mine ore does not convey the title; it is a mere license. Silsby *v.* Trotter, 29 N. J. Eq., 228.

"The owner of land, by a sealed and recorded instrument, granted and conveyed to A, his heirs, executors, administrators, and assigns, the exclusive right of entering on land and of erecting buildings, etc., for the purpose of boring oil, etc., but not to have possession of the land for any other purpose, A to deliver to the owner one-tenth of all oil gathered; to commence boring within a year or to forfeit all rights. Held, not a conveyance of the oil, but a license."
74 Shepherd *v.* McCalmont Oil Co., 38 Hun. (N. Y.), 37.

But this license may be revocable or irrevocable.

Considering this provision of the constitution as a contract, as it must be considered, whereby the Choctaw people agreed by a written instrument to grant a license to the discoverer of a coal mine to use it as long as he may choose, is it revocable?

The grant is without consideration, and it is revocable at the will of the grantee, and unless it be revocable at the will of the grantor there is a want of such mutuality in the contract as would render this provision void. Where there is no consideration, if the grantee may stop when he pleases, so may the grantor; and whether there be a consideration or not, if it is expressed in the instrument that

one may terminate it at will, the benefits of it will inure to the other.

In this case the grantee obligates himself to do nothing. He may quit at his will. The grantor is without power to enforce the contract as against him; besides, he has paid nothing for his privilege. It is without consideration, and nothing in the instrument binds him to a performance of its terms.

"It is a general principle that when from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party this party is equally incapable of enforcing it specifically against the other party." Fry on Spec. Perform., sec. 440.

"The parties to a contract must both be bound. If one promise in consideration of the promise of the other, the one is not bound unless the other is bound."

1 Wharton on Contracts, 2.

"The agreement, as before observed, must in general be obligatory on both parties. There are several cases satisfactorily establishing that if the one party never was bound on his part to do the act which forms the consideration of the promise of the other, the agreement is void for want of mutuality." 1 Chitty on Contract-, 297.

In Vogel *v.* Pekar, 157 Ill., 339, the contract was that "The said parties of the first part agree to employ the said party of the second part to perform such work as they may assign to him from time to time, such service to continue only so long as satisfactory to the said parties of the first part." Held, that as the party of the second part agreed to do nothing, it was void for want of mutuality; and the authorities are abundant to establish this principle.

In this case, what condition of the contract between the discoverer and his cotenant can be enforced against him? He may search for the hidden mineral or not, as he pleases. If he finds it, he may work it or not, as he may choose. If he work it, he may quit at his will. He may work much or little. He may locate one or many mines, and, no matter how profitable his enterprise may be to him, he pays no consideration to the owner, his grantor, for it. Under such circumstances it cannot be maintained that the right of revocation on the part of the Choctaw people does not exist.

But it is claimed that the plaintiff has obtained vested rights by virtue of the customs and usage of the Choctaw people from the fact that for a long time they have recognized this right, and stood by and permitted him to erect valuable improvements on the land and otherwise make a large expenditure of money in connection with the mines. The answer to this is that the usage, if any existed, is in harmony with the contract. By the terms of the contract he was to hold it until either party should exercise the right of revocation. And again, if the Choctaw people by deed could not convey an indefeasible title because of the provision of treaty stipulations, they could not do so by usage.

Again, it is claimed that the act of the Choctaw council of Sept.

18, 1896, had the effect of conferring the title to the discoverer of minerals. The first section of this act is as follows:

"SEC. 1. That the constitutional rights of any citizens of
76 the Choctaw nation to discover and claim any mine or mineral substance or anything of value found beneath the surface of the earth in this nation, and the right to work the same for the purpose of having such discovery made of value to himself and to the nation, as provided for by act of council passed and approved December 27, 1889, entitled 'An act to provide for the further development of the mineral resources of the Choctaw nation,' is hereby ratified and affirmed, and all such claims and discoveries where the laws of the nation have been observed in making and recording the same, are hereby declared to be the property of the citizen or citizens who have discovered and recorded such claims, their heirs or assigns, and are to be recognized and treated as the property of the citizens holding such claims, and may be by such holder sold, assigned or devised unto their heirs or assigns, provided the said heirs or assigns shall be citizens of the Choctaw nation at the time of making such disposition of such claims; and citizens holding such claims may lease them to non-citizens or foreign corporations, provided always that the interest and rights of the Choctaw nation are recognized in such leases. All leases of coal or other mineral rights heretofore made by citizens of the Choctaw nation to non-citizens or foreign corporations, in which leases the interest and right of the Choctaw nation have been recognized, the laws of the Choctaw nation observed, and the conditions and stipulations on the part of the lessee fulfilled, are hereby ratified and confirmed."

This act, if the Choctaw council had authority to pass it, undoubtedly passed title and a vested right to the discoverer of mines.

But if the people of the Choctaw nation, the owners of the realty, by a constitutional provision enacted by their direct vote, could not in this way convey title, how could their legislature do so? And if they could, where do they find warrant in the constitution for this legislation? The constitutional provision, in so far as the vesting of
77 title is concerned, is self-enacting. It needs no legislation. The Choctaw council has no power to convey their lands or in any way to fix upon the title any such vested interest as would interfere with the alienation of them by their owners. Not because it has not all powers usually vested in the legislature of representative governments, but because of the title which is in the people individually and not in the government. The title to their lands are unlike those belonging to the United States. As to them, the fee is in the Federal Government; but, as before stated, the title to the Choctaw lands is in the people as tenants in common, and they alone may convey. Doubtless the people could, by a constitutional provision submitted to their vote and adopted by them, vest in the council such power as they possess; but they have not done so. The constitution will be searched in vain for the discovery of any such agency; and it is the existence of this very condition that rendered it necessary to submit the Atoka agreement to a vote of the

people instead of to the council, and but for this all of the agreements made between the commissioners to the five civilized tribes and these Indians might be ratified by their councils; but this cannot be done. Because of their title, the agreements must be adopted and ratified by the owners, who are the people of these tribes who hold by a tenancy in common.

I therefore hold that the Choctaw council is without power to convey the title to or create any vested interest in these mines, and if the statute intends to do so it is void, both because in violation of treaty provisions and without constitutional warrant.

Finding no equity in the bill, the demurrer is sustained, the injunction refused, and the plaintiffs permitted to plead over.

UNITED STATES OF AMERICA, }
Indian Territory, Central District. }

I, E. J. Fannin, clerk of said district, hereby certify that the foregoing is a true and correct copy of the opinion of the court in the above-entitled cause as the same now appears on file in my office.

Witness my hand and the seal of said court this January 18, 1900.

{ Seal United States Court in the Indian Territory, Central District. }

E. J. FANNIN, *Clerk.*

78 [Endorsed:] File No., 17,518. Supreme Court U. S., October term, 1899. Term No., 404. W. H. Ansley *et al.*, app'ts, *vs.* N. B. Ainsworth *et al.* Stipulation and addition to record. Filed Feb'y 2, 1900.

Endorsed on cover: File No., 17,518. Indian Territory U. S. court. Term No., 404. W. H. Ansley, M. H. Gleason, and R. O. Edmonds, appellants, *vs.* N. B. Ainsworth, L. C. Burriss, O. E. Woods, James Elliott, and The Ola Coal and Mining Company. Filed September 26th, 1899.

No. 404 136

Brief of Cases for Appellants

Filed Dec. 5, 1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 404.

W. H. ANSLEY, M. H. GLEASON, and E. G. EDMONDS, Appellants,

vs.

N. B. AINSWORTH, L. C. BURRIS, G. E. WOODS, JAMES ELLIOTT, and THE OLA COAL AND MINING COMPANY.

APPEAL FROM THE UNITED STATES COURT IN THE INDIAN TERRITORY.

BRIEF OF APPELLANTS.

YANCEY LEWIS,
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Attorneys for Appellants.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 105.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 404.

W. H. ANSLEY, M. H. GLEASON, AND R. O. EDMONDS, APPELLANTS,

VS.

N. B. AINSWORTH, L. C. BURRISS, O. E. WOODS, JAMES ELLIOTT, AND THE OLA COAL AND MINING COMPANY.

APPEAL FROM THE UNITED STATES COURT IN THE INDIAN TERRITORY.

BRIEF OF APPELLANTS.

STATEMENT OF THE NATURE AND RESULT OF THE SUIT.

This is a suit in equity, brought in the United States Court for the Central District of the Indian Territory, sitting at South McAlester, by the appellants, plaintiffs below, W. H. Ansley, M. H. Gleason, and R. O. Edmonds, against appellees, defendants below, N. B. Ainsworth, L. C. Burriss, O. E. Woods, James Elliott, and The Ola Coal & Mining Company. The substance of the complaint is as follows:

It alleged that W. H. Ansley is by blood a member and citizen of the Choctaw nation of Indians; that appellants M. H. Gleason and R. O. Edmonds are citizens of the United States by birth, but by virtue of intermarriage with members of the Choctaw nation, solemnized as required by the laws of said nation, became members thereof by adoption and entitled under the treaties and laws of said nation to all the rights, privileges, benefits and immunities of citizens of said nation. That all of said defendants are residents of the Central District of the United States Court in the Indian Territory; that N. B. Ainsworth is a citizen of the Choctaw nation, resident therein, and L. C. Burriss a citizen of the Chickasaw nation, resident in said nation; that O. E. Woods and James Elliott are citizens of the United States, resident in the Choctaw nation. That The Ola Coal & Mining Company is a corporation under the laws of Kansas, engaged in operating a mine in said Choctaw nation, at Wilburton, I. T., and having its offices and agents at said point; the defendant Elliott being president thereof, and the defendant Woods general manager. That the defendants Ainsworth and Elliott reside nearer to the town of South McAlester than they do to any other point at which the United States Court is held in the Central District of the Indian Territory.

1. Plaintiffs specially pleaded article 2 of the treaty executed between the United States and the Choctaw nation on October 18, 1820, whereby the United States ceded to said nation the lands at present held and occupied by it.

Also article 2 of the treaty executed between the United States and the Choctaw nation on September 27, 1830, providing that the United States should convey to the Choctaw nation, under a grant specially to be made by the President of the United States, in fee simple to them and their descendants, to inure to them while they should exist as a nation and live on it, the land theretofore ceded.

Also article 4 of said treaty, whereby the government and people of the United States were obliged to secure to the said Choctaw nation the jurisdiction and government of all persons

and property that might be within their limits west, so that no State or Territory should ever have a right to pass laws for the government of the Choctaw nation and their descendants, and no part of the land granted them should ever be embraced in any Territory or State, but the United States should forever secure said Choctaw nation from and against all laws except such as from time to time might be enacted in their own national council not inconsistent with the Constitution, treaties, and laws of the United States, and except such as might be, and which had been, enacted by Congress to the extent that Congress, under the Constitution, was required to exercise legislation over Indian affairs.

Also article 12 of said treaty, providing, among other things, that all intruders should be removed from the Choctaw nation and kept without it, and that private property should always be respected, and on no occasion taken for public purposes without just compensation being made therefor to the rightful owner.

Also article 1 of the convention and agreement made on January 17, 1837, between the Choctaw and Chickasaw nations of Indians, whereby the Choctaws gave the Chickasaws the privilege of forming a district out of their (the Choctaw) country, to be held on the same terms that the Choctaws held except the right of disposing of it, which was to be held in common between the Choctaws and Chickasaws, and conferring other rights upon the Chickasaws.

Also article 2 of said convention and agreement, which defined the boundaries of the Chickasaw district.

Also the patent executed by the President of the United States on March 23, 1842, conveying to the Choctaw nation the lands described in the second article of the treaty of 1830, granting said lands to the Choctaw nation "In fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it, liable to no transfer or alienation except to the United States or with their consent."

Also article 2 of the treaty of 1855 between the United States and the Choctaw and Chickasaw tribes of Indians, containing

the stipulation: "And pursuant to the Act of Congress, approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common, so that each and every member of either tribe shall have an equal undivided interest in the whole; provided, however, no part shall ever be sold without the consent of both tribes, and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same."

It was alleged that by article 2 of said treaty, a district for the Chickasaws was established and the boundaries thereof fixed and declared. That by article 3 of said treaty it was provided that the remainder of the country held in common by the Choctaws and Chickasaws should constitute the Choctaw district.

Plaintiffs also specially pleaded article 4 of said treaty, providing for the continuance of existing laws until the Chickasaws should adopt a Constitution and enact laws of their own, and providing for the determination of judicial proceedings already instituted according to existing laws.

Also article 5 of said treaty, whereby the right was conferred upon members of either of the tribes to settle freely within the jurisdiction of the other, and be entitled to all the rights, privileges and immunities of citizens thereof, except that no member of either tribe should be entitled to participate in the funds belonging to the other tribe.

Also article 7 of said treaty, providing as follows: "That so far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government and full jurisdiction over persons and property in their respective limits, excepting, however, all persons, with their property, who are not by birth, adoption, or otherwise, citizens or members of either the Choctaw or Chickasaw tribe." And fur-

ther providing for the removal of said persons by the United States, with certain exceptions stated.

Also article 21 of said treaty, whereby it was provided that this convention should supersede and take the place of all former treaties between the United States and the Choctaws, and also of all treaty stipulations between the United States and the Chickasaws and between the Choctaws and Chickasaws, inconsistent with the agreement.

It was alleged that in pursuance of the provisions of the treaty of 1820 and of subsequent treaties, the Choctaw people erected a government, distributed its powers among the executive, legislative, and judicial departments, established written constitutions, developed a body of laws,—written and unwritten,—exercised jurisdiction over its citizens and its tribal property, administered justice, founded schools, and in all respects conformed to the laws and usages of civilized states. That in pursuance of an act of the General Council of the Choctaw nation, approved October 24, 1859, representatives of said nation, in convention assembled, ordained and established a Constitution superseding prior Constitutions, which Constitution was in pursuance of said act submitted for ratification or rejection to the qualified voters of the Choctaw nation, at an election held as provided by law, and was at such election adopted by the unanimous vote of all the electors participating in such election, and as thus adopted has continued as the supreme organic law of the Choctaw nation to the present time. Various provisions of the bill of rights contained in this Constitution are specially pleaded, and in particular section 5 of article 1, enacting, "Nor shall any person's property be taken or applied to the public use without the consent of the General Council, and without just compensation being first made therefor."

Also section 11 of said article, providing that no freeman should in any manner be deprived of his life, liberty and property but by the judgment of his peers or the law of the land.

Also section 16 of said article, providing that no power of sus-

pending laws should be exercised except by the General Council or its authority.

Also section 1 of said article, providing that the accused can not be compelled to give evidence against himself, nor be deprived of life, liberty or property but by due course of law.

Also section 21, providing that the General Council should pass no bill of attainder nor retrospective law, nor law impairing the obligation of contracts.

Also section 18 of article 7 of said Constitution, providing, "Any citizen of this nation who shall find any mine, or mines, or mineral waters, shall have exclusive right and privilege to work the same so long as he may choose within one mile in any direction from his works or mines; providing further, he does not interfere with the rights of the former settler."

Plaintiffs also specially pleaded article 7 of the treaty between the United States and the Choctaw and Chickasaw nations, made on the 28th day of April, 1866, whereby the Choctaws and Chickasaws agreed to such legislation as Congress and the President of the United States might deem necessary for the better administration of justice and the protection of rights of person and property within the Indian Territory; providing further, that such legislation should not in anywise interfere with or annul their present tribal organizations or their respective legislatures or judiciaries, or the rules, laws or customs of the Choctaw and Chickasaw nations respectively.

Also article 10 of said treaty, whereby the United States reaffirmed all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw nations entered into prior to the late rebellion and in force at that time, not inconsistent herewith. It was alleged that said treaty contained provisions looking to the allotment in severalty of the lands held in common with the Choctaw and Chickasaw people.

Article 33 of said treaty was also pleaded, providing that all lands selected as therein provided should thereafter be held in severalty by the respective parties, and all unselected lands should be the property of the Choctaw and Chickasaw nations

in their corporate capacity, subject to the general control of their legislative authorities. It was alleged that an allotment was never made, and that the people of the Choctaw and Chickasaw nations have continued to this date to hold their lands as they held them before the adoption of said treaty.

Article 26 of said treaty was pleaded, whereby it was provided that the right therein given to the Choctaws and Chickasaws respectively should extend to all persons who had become citizens by adoption and inter-marriage of either of said nations, or who might thereafter become such.

Also article 38 of said treaty, enacting that every white person who, having married a Choctaw or Chickasaw, resides in said Choctaw or Chickasaw nation or who had been adopted by the legislative authorities, should be deemed a member of said nation and subject to the laws of the Choctaw and Chickasaw nations according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he were a native Choctaw or Chickasaw.

Also article 43 of said treaty, whereby the United States promised to exclude white persons, except officers, agents, and employes of the government and of any internal improvement company, or travelers, it being provided that such article should not be construed to prevent the legislative authorities of the respective nations from authorizing such works of internal improvement as they might deem conducive to the general welfare of the nation, or be taken to interfere with or invalidate any action which theretofore had been had in that connection by either of said nations.

Also article 45 of said treaty, providing that said nations should have all the rights, privileges and immunities theretofore possessed by said nations or individuals thereof or to which they were entitled under the treaties and legislation theretofore made and had in connection with and so far as consistent with the provisions of this treaty.

2. It was alleged that under and by virtue of the provisions

of the Choctaw Constitution, in section 18, article 7, above set out, citizens of the Choctaw nation from the time of its adoption began to prospect for coal, and incurred much expense in making discoveries of coal theretofore unknown; that from said date, without interruption or hindrance, to June 28, 1898, they exercised the right of working by themselves, or licensing or contracting with other persons to work for them, said discoveries and to mine coal thereon for the space of one mile in every direction from the improvements made upon such coal discoveries; that such coal discoveries within such limits were, by uniform custom, usage and construction, from the adoption of the Constitution as aforesaid, held to be the property of the Choctaw citizen discovering the same or of those to whom he devised or assigned the same, provided such devisees or assignees were citizens of the Choctaw nation; that from the adoption of the Constitution, as aforesaid, the custom and usage of leasing said coal claims by the discoverers to persons, or companies, or corporations, for the purpose of mining coal thereupon for a stipulated royalty to be paid to the owner of said coal discovery, had been uniform and long since become thoroughly established and general throughout the Choctaw nation; that said nation recognized the rights of such coal discoverer to lease such coal claims and to receive royalties thereon, under the uniform custom and usage that had grown up under the said constitutional provision as aforesaid. That said nation, by act of its council approved by its governor, enacted laws by which the lessees of said coal claims were permitted to sell the coal mined upon obtaining a contract from the national agent of said Choctaw nation, and upon the payment of a royalty of one-half cent per bushel of coal to said nation. A copy of said act was attached, marked "Exhibit A," and specially pleaded as part of the complaint; that under said law, persons, companies, and corporations mining coal upon the coal discoveries leased from individuals, obtained contracts from the national agent of the Choctaw nation in form and substance the same as that which is attached to the complaint as "Exhibit B" and made a part of it, and which

was obtained by defendant Woods from the national agents of said nations. That the rights of the discoverers of coal claims, their heirs or assigns, to work, lease, or assign said claims were fully recognized in all the Choctaw courts, became the subjects of devise or administration, were sold, transferred and pledged by one member of the nation to another in all the modes incident to absolute ownership of property, and the royalties payable from the lessees of said coal claims became the basis of large advancements for money or supplies by persons within and without the Choctaw nation; that the rights of coal discoverers, their heirs or assigns, to the coal claims within the limits above set out, as established under the uniform custom and usage of the Choctaw nation and the construction of the Choctaw Constitution as aforesaid, were known to and fully recognized by the executive officers of the United States, the Secretary of the Interior, their agents and employes, and that the same were fully recognized by Congress in various acts of legislation. That in the courts of the United States these rights originating under the constitutional provision and under the laws, custom and usage of the Choctaw nation as above set out, and as herein stated and declared, were at all times recognized, vindicated, upheld and enforced; that under the clause of the Constitution aforesaid, and the usage and custom of the Choctaw nation with reference to mines and minerals thereunder, the discovery of coal claims was greatly encouraged; that mines therein were developed by said discoverers or their lessees, and from the working of said mines large royalties accrued to the Choctaw nation, becoming the support of the schools and amounting during the last four or five years to over $100,000 per annum; that it became the settled policy of the Choctaw nation to encourage discoveries by citizens under the constitutional clause and custom above set out, and that in 1889 it passed an act entitled "An act to provide for the further development of the mineral resources of the Choctaw nation; which act is attached to the complaint as "Exhibit C" and specially pleaded. That by its constitutional provision, its laws, usages and customs, its definite

and consistent policy aforesaid, not only were citizens of the Choctaw nation induced to incur expense in making coal discoveries as aforesaid, but great numbers of persons, companies and corporations, not citizens of the Choctaw nation, were allowed to obtain, with full knowledge and approval of the constituted authorities of the Choctaw nation, leases of said coal claims and discoveries from the individual Choctaw citizens discovering and owning them. That for the purpose of mining coal on said leased coal claims, said persons, companies and corporations incurred great expense in preparing the mines to be worked, in purchasing expensive machinery, etc. That the improvements and outlays of said companies and corporations aggregated millions of dollars expended upon the basis of the rights of the individual discoverers and owners of the coal claims as herein above declared. That to give further assurance to coal operators, the council of the Choctaw nation, on September 18, 1896, passed an act to confirm the rights of its citizens by providing that all said claims and discoveries, where the laws of that nation had been observed in making and recording the same, should be the property of the citizen or citizens, who had discovered and recorded said claims, their heirs or assigns, and should be recognized and treated as the property of the citizens holding said claims, and might be by said holders sold, assigned, or devised unto their heirs or assigns, provided the said heirs or assigns should be citizens of the Choctaw nation at the time of making such disposition of said claims. The leases of the owners of coal claims were also confirmed by this act, which is set out at length in the complaint.

3. That under the conventions and agreements between the Choctaw and Chickasaw nations, each nation recognized in the other the right to legislate over persons and property within the limits of their respective districts; that each nation enacted its own legislation for the protection and development of mining rights and interests within their respective limits; that the constitutional provision, custom and usage with reference to mining rights were fully known to the Chickasaw authorities,

became a matter of arrangement between the two nations under the sanction of the Interior Department of the United States soon after the adoption of the constitutional provision aforesaid, and that by and under this arrangement the Chickasaw nation received one-fourth of the royalties paid to the Choctaw nation for the mining of coal within its limits and applied the same to the public uses of the said Chickasaw nation, which with full knowledge and by arrangement had acquiesced in and consented to the laws and customs of the Choctaw nation with reference to mining rights.

4. That on the 7th day of November, 1890, plaintiffs Gleason and Edmonds, and one Lorin A. Riddle, a citizen by blood of the Choctaw nation, discovered coal on the claim described in the complaint. Allegation is made of compliance with all the requirements of the constitutional provision and of the laws and customs of the Choctaw nation by these parties in reference to said coal claim; that by virtue of their discovery and said compliance, the said parties acquired a vested, absolute, and indefeasible right to mine coal within a circle having a radius of one mile, and beginning at the point of excavating coal as aforesaid, and to give, bequeath, sell, transfer, convey, or assign said right to any other Choctaw citizen, and to contract, by lease or otherwise, with any person, company, or corporation to mine coal for a period of years, to the exclusion of any other persons, corporations or companies whatsoever, so long as said persons, corporations or companies complied with the laws of the Choctaw nation to them and their mining operations applicable. That on February 28, 1898, the said Lorin A. Riddle, for a valuable consideration, conveyed his undivided one-third interest in said coal claim to the plaintiff W. H. Ansley. Plaintiffs alleged that they had not been reimbursed for the work and labor done and money expended in making said coal discoveries and for producing coal thereon; that their rights in said discoveries exceed in value the sum of $5000; that by virtue of their discovery and of the purchase by Ansley from Riddle they acquired a vested right in and to said coal claim, indefeasible, and exist-

ing so long as they chose to exercise the same. They alleged that if they were in law mistaken as to the duration of their right in the coal claim above described, then they averred that said right was vested, absolute, and indefeasible so long as the said Choctaw nation should exist as a nation and until the said right should have been divested in the mode provided under the laws of said nation.

5. They alleged a contract by plaintiffs with one O. E. Woods, whereby the said Woods was permitted to mine coal upon said claim for the period of six years upon payment of the customary royalty of one-fourth of one per cent per bushel, and upon compliance with the laws of the Choctaw nation to such mining operations applicable. That the said Woods, by arrangement and agreement with the defendant, The Ola Coal & Mining Company, had authorized said company to mine coal within the limits of the coal claim leased to him; that the terms of said agreement are not particularly known to plaintiffs, but that under said agreement said company became bound to pay plaintiffs royalty on coal mined by it on the coal claim aforesaid, according to the terms of the original agreement. That the said Woods and said company are indebted to plaintiffs in the sum of $1100 as royalties for coal mined on said claim.

6. Plaintiffs set out section 16 of the act of Congress, entitled, "An act for the protection of the people of the Indian Territory, and for other purposes," approved June 28, 1898, making it unlawful for any person, after the passage of said act, to claim, demand, or receive for his own use, or for the use of anyone else, any royalty on oil, coal, asphalt, or mineral, within the limits of the tribes of the Indian Territory, or for anyone to pay any individual any such royalties or rents or any consideration therefor whatsoever.

Also section 18 of said act, providing that any person evading or violating said provision should be punished by fine of not less than $100, and should forfeit possession of any property in question, and that each day in which said offense was committed or continued to exist should be deemed a separate offense.

Also section 29 of said act ratifying the agreement with the Choctaw and Chickasaw tribes of Indians, made by the Commission to the Five Civilized Tribes on the 23d day of April, 1897, as amended, and providing for an election to be held by the qualified voters of said tribes, and enacting that said agreement should have full force and effect if ratified by a majority of the whole number of votes cast. Also the allegation that an election was held as provided, on the 24th day of August, 1898, and it was proclaimed that said agreement had been adopted. The provisions of said agreement as affecting mining rights are set out in full.

Said agreement provided that all coal and asphalt should remain and be the common property of the members of the Choctaw and Chickasaw tribes (freedmen excepted), so that each and every member should have an undivided interest in the whole; that coal and asphalt mines should be under the supervision and control of two trustees appointed by the President of the United States upon the recommendations of the Governors of the Choctaw and Chickasaw nations respectively, acting under such rules as might be prescribed by the Secretary of the Interior. All agreements by any person or corporation with any member or members of the Choctaw or Chickasaw nations, the object of which was to obtain said member or members' permission to operate coal or asphalt mines, were declared void. Said agreement fixed the right of royalty upon coal mines and required payment thereof into the Treasury of the United States.

7. That pursuant to the provisions of said agreement, N. B. Ainsworth and L. C. Burriss were appointed coal trustees for the Choctaw and Chickasaw nations respectively; that the Secretary of the Interior had issued regulations governing mining leases in the Choctaw and Chickasaw nations, section 3 of which regulation was set out in full.

That the defendants Wood and Elliott intended, as officers of The Ola Coal & Mining Company, to make application to said Ainsworth and Burriss, as coal trustees, for a lease to The Ola Coal & Mining Company covering the coal claim or dis-

covery belonging to plaintiffs as described in the complaint. That said trustees intended to receive said application and forward the same to the United States Indian Inspector as in the regulations of the Secretary of the Interior set out, and, if authorized by him, to execute a lease of said premises to The Ola Coal & Mining Company or to defendants Woods and Elliott, or one of them, for its use and benefit; that said defendants Woods and Elliott and The Ola Coal & Mining Company, since the adoption of the act of Congress, approved June 28, 1898, aforesaid, had failed and refused to pay the royalties accruing to plaintiffs under and by virtue of the terms of their obligations to them as aforesaid, as well as the royalties which had accrued and were payable under the terms of said lease prior to said date; that said royalties amounted to the sum of $1100, which was due and payable. That said defendants Woods and Elliott and The Ola Coal & Mining Company intended to pay said royalties into the Treasury of the United States and to wholly and totally disregard the rights of plaintiffs to the same.

8. That by the provisions of said agreement as above set out, and by the acts of the defendants, Woods and Elliott and The Ola Coal & Mining Company, in refusing to pay the royalties due the plaintiffs because of sections 16 and 18 of said act of Congress, and their proposed payment of same into the Treasury of the United States, plaintiffs were deprived of their property without notice, without hearing, and in violation of the fifth amendment to the Constitution of the United States providing that no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation, and in violation of section 1 of the fourteenth amendment to the Constitution of the United States, providing that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

That by the action of the defendants Woods and Elliott and

The Ola Coal & Mining Company in applying for and obtaining a lease to the premises included in plaintiffs' lease to them, and by the action of the defendants Ainsworth and Burriss in receiving said application and transmitting the same to the United States Inspector for the Interior Department in the Indian Territory, receiving his approval and executing the said leases and forwarding the same to the Secretary of the Interior, if such acts were permitted, a cloud would be cast upon plaintiffs' rights to said coal claim and upon their right to work the same by themselves or their lessees, and by the operation and enforcement of the provisions of the agreement purporting to be between the United States and the Choctaw nation as above set out, plaintiffs were deprived of property in violation of the provisions of the Constitution of the United States above mentioned.

9. That the provisions of said agreement above set out, so far as they deprive plaintiffs of their right in the coal claim aforesaid and their right to royalties contracted to be paid by the defendants Woods, Elliott, and The Ola Coal & Mining Company for mining coal upon the same, and so far as they conferred authority upon the coal trustees to execute leases of said premises to other persons under the regulations and upon the approval of the Secretary of the Interior, authorized plaintiffs' property to be taken and applied to public use without the consent of the General Council of the Choctaw nation thereunto first had and obtained, and without just compensation being made therefor, in violation of section 5 of article 1 of the Constitution of the Choctaw nation heretofore set out, and authorized plaintiffs to be deprived of their property otherwise than by the judgment of their peers or the law of the land, in violation of section 11 of article 1 of the Constitution of the Choctaw nation heretofore set out, and authorized the taking of plaintiffs' property without due course of law but against said due course of law, in violation of section 17 of article 1 of the Constitution of the Choctaw nation heretofore set out; that such provisions of the agreement impaired the obligation of the contract arising and existing between plaintiffs and the Choctaw

nation under the facts heretofore set out and by virtue of the provision in its Constitution with reference to the rights of coal discoveries heretofore mentioned, in violation of section 27 of article 1 of the Constitution of the Choctaw nation.

That said provisions of the Choctaw Constitution, and the provisions thereof with reference to the rights of discoverers of coal or other minerals, as above set out, were made in pursuance of the treaties of the United States authorizing same and expressly validating said constitutional provisions when enacted, as especially appears from the provisions of article 2 of the treaty of 1820, and article 7 of the treaty of 1855, and article 43 of the treaty of 1866, all of which have heretofore been set out. That the rights of plaintiffs, arising under the laws, customs, usages, and Constitution of the Choctaw nation, authorized to be enacted and adopted by the treaties with the United States and reaffirmed and validated after enactment by said treaties, are rights acquired and vested by virtue of the treaties and laws of the United States, and not defeasible by legislation of the Congress of the United States or of the Choctaw nation, or otherwise than by due process of law after notice and hearing and with full compensation.

10. Plaintiffs averred that the purported agreement between the United States and the Choctaw nation was invalid and inoperative, because not adopted in mode known to the laws, in this: That section 11 of article 7 of the Constitution of the Choctaw nation authorized the General Council of said nation to pass such laws and measures as it should deem expedient for the general good of the Choctaw people, provided no law should be passed or adopted contrary to the provisions of the Constitution; that section 1 of article 9 of said Constitution provided for an amendment of the Constitution to be proposed by a majority of the members of the General Council of the Choctaw nation and voted upon in manner and after proclamation as provided in said article; that the agreement aforesaid was never presented to the General Council of the Choctaw nation nor proposed by a majority of its members as an amendment to the

Constitution, nor was it submitted by the authority and in the manner prescribed for the adoption of amendments to the Constitution, but that the election was held by virtue of a proclamation issued by the Governors of the Choctaw and Chickasaw nations acting without any authority conferred upon them by any law defining their duties as Governors of said nations or pertaining to their respective offices; that at said election members of the Chickasaw nation were permitted to vote at voting places in the Choctaw nation and members of the Choctaw nation to vote at voting places in the Chickasaw nation, whereby the opportunity for fraudulent practices and duplication of votes was furnished and afforded, and by reason whereof it was not possible to know whether said agreement received a majority of the votes cast by the qualified voters of the Choctaw nation; that said agreement affects the title to the land belonging to the Choctaw and Chickasaw people by grant from the United States and patent executed in pursuance thereof, as well as the other property of the Choctaw and Chickasaw people, plaintiffs inclusive; that by virtue of said agreement the property rights of the Choctaw and Chickasaw people in general, and of these plaintiffs in their coal discovery as above set out in particular, were changed, modified, and in the latter case destroyed by an agreement against which nearly one-half of the votes cast were recorded, and which was submitted in accordance with none of the forms of procedure for the Choctaw or Chickasaw nation, as provided by their Constitution and laws made in pursuance of treaties with the United States; that these plaintiffs and the Choctaw people held and acquired their property rights subject to general powers of legislation on the part of the Choctaw nation, as limited and defined by the Constitution and laws thereof, executed consistently with the Constitution and laws of the United States, and that such rights were not subject to be divested, changed, modified or in any way impaired except by due course of legislation enacted consistently with the Constitution and laws of the Choctaw nation aforesaid, adopted in harmony with the Constitution and laws of the United States.

That said agreement, having been adopted in manner and form otherwise than as provided by said Constitution and laws of the Choctaw nation, and divesting, destroying, changing, and impairing many of the rights of the plaintiffs as members of the Choctaw nation, and in particular destroying their rights of property in the coal discovery aforesaid, was because of the mode and form of its promulgation not adopted by due course of law, but against said due course of law and in violation of the fifth and fourteenth amendments to the Constitution of the United States.

11. Plaintiffs further averred that said agreement, so far as it impairs, destroys, modifies, or changes the property rights of the citizens of the Choctaw nation and of plaintiffs, is inoperative and void, because it does not rest upon the free consent of the people of the Choctaw or Chickasaw nations or of a majority of their qualified electors or of any of their citizens. That the appearance of consent to said agreement, existing by reason of the fact that a majority of the votes at the election aforesaid were cast in its favor, is false, specious and unreal, because the voters voting in favor of the same were compelled thereto by coercion and duress exercised by the United States as follows:

By the act of Congress approved June 7, 1897, the jurisdiction of the courts of the Choctaw and Chickasaw nations as theretofore existing was taken away, and after January 1, 1898, conferred upon the United States courts in the Indian Territory, but by said act it was provided that said nations could avoid the effect of this provision by entering into an agreement on or before January 1, 1898, with the Commission to the Five Civilized Tribes theretofore appointed on the part of the United States to treat with said tribes; that commissions on behalf of said Choctaw and Chickasaw nations respectively were appointed by the authorities thereof, who met with said Commission of the United States and framed the agreement aforesaid; that said agreement was submitted to the council of the Chickasaw nation, and by said council rejected; that said agreement

was never submitted to the council of the Choctaw nation; that by the failure to adopt such agreement the jurisdiction of the courts of said nations was taken away by the operation of the act of Congress aforesaid and vested in the United States on and after January 1, 1898.

That the members of said nation were deeply attached to their government with its courts and legislative and executive functions, and were wholly averse to surrendering the same or any part thereof, but preferred to lose the same rather than accept the provisions of said agreement; and that after the jurisdiction of their courts had been taken away by operation of the act of June 7, 1897, said agreement was amended and ratified by the Congress of the United States in the act of June 28, 1898, and directed to be submitted to the qualified electors of the said nations, as hereinbefore set out; that the said act of June 28, 1898, provided in section 26 thereof as follows:

"That on and after the passage of this act, the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory."

That by the act of June 7, 1897, the jurisdiction to enforce all laws in the Indian Territory had become vested in the United States courts, which thereupon enforced and upheld the laws of said nations whenever they were the basis of property rights, as said courts had done from their organization in the Indian Territory; that by the provisions of section 26 of the act of June 28, 1898, such courts were forbidden to enforce at law or in equity the laws of the Choctaw or Chickasaw nations; that the effect of this provision was that the only courts in which the members of these tribes could assert their rights or seek for redress of injuries were forbidden to recognize any right based upon the laws theretofore controlling the members of said nations and defining their personal and property rights. That by this situation the tenures of all holdings by citizens of the Choctaw and Chickasaw nations, the descent of property,

the devolution of estates, and all the rights of property in whatever form arising or existing, as declared by the only law in which such rights had foundation or origin, were swept away by being rendered unenforcible in the only courts having jurisdiction of the parties.

That by the same act of Congress which inhibited the enforcement at law or in equity of the laws of the Choctaw and Chickasaw nations by the United States courts, the aforesaid agreement was resubmitted, and the citizens of said nations were enabled to secure the continued existence of their governments and their laws and to revest jurisdiction in their courts to enforce said laws by adopting such agreement, and thereby at the same time to avoid the disastrous consequences to personal and property rights, the anarchy with reference to the same necessarily created, if they failed to accept such agreement; that influenced by the desire to continue the government of the nations and the jurisdiction of their courts, and coerced by the suspension of all laws upon which their rights rested, the electors of said nations, against their will and inclination, in the absence of their free consent or desire, voted for said agreement, and by reason of the coercion and duress placed upon them, in manner and form as stated, said agreement, so far as it purports to rest upon the consent of the Choctaw and Chickasaw nations, and to in anywise affect the property rights of the members of said nations and of plaintiffs, and to authorize the acts proposed to be done thereunder by defendants, as before averred, is wholly inoperative, ineffectual, and void, because the adoption of said agreement, secured as aforesaid, was not by due process of law, but against such due process of law, by reason whereof the same is in violation of the fifth and fourteenth amendments to the Constitution of the United States, so far as said agreement is made the basis for divesting property rights of plaintiffs under former laws vested and enjoyed.

12. That from the time the Commission of the United States was created, the members of said tribes were continuously informed by said Commission, by private, public, and published

utterances, that unless said tribes made agreements changing the tenure of their land holdings and the rights of their respective governments the United States would do these things by the exercise of its own plenary powers without regard to the will or inclination of said tribes; that after the adoption of the act of Congress of June 28, 1898, and the ratification by the Congress of the agreement aforesaid, the members of the Choctaw and Chickasaw nations were again told, in the manner aforesaid by the members of said Commission, that unless said agreement were adopted the United States would not only enforce the provisions of the act of June 28th, but would adopt more stringent and radical legislation affecting said tribes and the members thereof; that by these representations and statements the members of said tribes were further coerced and compelled against their will and without their consent or desire into voting for said agreement.

12a. That the agreement aforesaid and all provisions of the act of June 28, 1898, not therein contained, which impaired or affected the property rights of the Choctaw and Chickasaw nations and of the members thereof individually, and so far as they affected or impaired the rights of plaintiffs in their coal claim aforesaid, are inoperative and void, because in said act and in said agreement and by the mode of their enactment and adoption, Congress delegated its powers of legislation to the voters of the Choctaw and Chickasaw nations in violation of sections 1 and 7 of article 1 of the Constitution of the United States.

13. It was averred that if defendants Elliott, Woods, and The Ola Coal & Mining Company were permitted to make application for the lease of the coal claim or discovery as aforesaid and to obtain leases therefor, plaintiffs' right in the premises would be clouded and they exposed to great and irreparable injury. That under article 16 of the act of June 28, 1898, as aforesaid, if plaintiffs claimed or demanded the royalties due from said defendants or which might thereafter become due, they would subject themselves to a fine of $100 for each claim or demand so asserted. That these penalties in the course of a few

years would become great in amount, and expose plaintiffs to the necessity and humiliation of defending charges of crime against the laws, as well as to the loss of their property in making defense. That if the defendants above named paid said royalties into the treasury of the United States as they proposed, plaintiffs would be without remedy, inasmuch as they were unable to sue the United States for the same; that if said defendants paid said royalties to an officer of the United States in pursuance of said agreement, it was doubtful whether plaintiffs could establish liability against them therefor; that in order to establish such liability for each recurring amount of royalty as it fell due, they would be compelled to bring a multiplicity of suits.

14. Plaintiffs alleged that in view of the premises they were remediless at law, and prayed that The Ola Coal & Mining Company, James Elliott, and O. E. Woods, as individuals and as officers of said Ola Coal & Mining Company, their agents, attorneys, employees, and servants, and each and every one of them, be restrained from paying the royalties due plaintiffs or which might become due by virtue of the production of coal on the coal claim or discovery aforesaid into the Treasury of the United States; and that they, and all other persons, companies, and corporations, their agents, servants, and employes, be restrained from making application to the defendants Ainsworth and Burriss, coal trustees as aforesaid, in their individual or official capacity, for the lease of said coal claim or discovery hereinbefore described or any part thereof, and that the defendants Ainsworth and Burriss be restrained from receiving such application to lease said premises, and from forwarding the same to the Inspector of the Interior Department with the statement of facts thereunto pertaining for the purpose of obtaining his authority to execute the same, and from forwarding the same to the Secretary of the Interior at Washington; and that upon final hearing they have judgment against the defendants The Ola Coal & Mining Company, O. E. Woods, and James Elliott for royalties due them by virtue of the production of

coal in said coal claim or discovery as aforesaid, and that they have judgment making perpetual the injunction against all of said defendants as herein provided for, and for costs and for such other and further relief as in equity, under the facts, they might be entitled to. (R., 1-25.)

All the defendants waived summons and entered appearance in the above entitled cause. They demurred to the amended complaint filed by plaintiffs on leave of court, the grounds of said demurrer being:

First, that the complaint does not state facts sufficient to constitute a cause of action.

Second, that the complaint does not state facts sufficient to constitute an equitable cause of action. (R., 32-33.)

The court after argument sustained the demurrer, and upon plaintiffs declining to plead further, dismissed the complaint for want of equity, to which action of the court plaintiffs excepted and prosecute this appeal. (R., 33.)

ASSIGNMENT OF ERRORS.

The plaintiffs in this action in connection with their appeal file the following assignment of errors, which they aver occurred upon the trial of this cause and in the decree rendered therein, to wit:

First. The court erred in holding that the amended complaint in this cause does not state facts sufficient to constitute a cause of action.

Second. The court erred in holding that the amended complaint in this cause does not state facts sufficient to constitute an equitable cause of action, and in holding that the amended complaint in this cause is without equity.

Third. The court erred in sustaining the demurrer of the defendants to plaintiffs' amended complaint.

Fourth. The court erred in rendering judgment in favor of defendants in this cause upon the demurrer filed herein. (R., 34.)

BRIEF AND ARGUMENT.

I.

THE RIGHT OF COAL DISCOVERERS AND THEIR ASSIGNS, UNDER THE PROVISION OF THE CONSTITUTION OF THE CHOCTAW NATION, AS DEFINED BY CONTEMPORANEOUS CUSTOM AND CONSTRUCTION AND THE COURSE OF LEGISLATION OF SAID NATION, TO MINE COAL UPON SAID COAL CLAIMS AND TO PERMIT OTHERS TO MINE COAL THEREON UNDER LEASE, IS A VESTED RIGHT, ARISING UNDER AND BY VIRTUE OF THE CONSTITUTION AND LAWS OF THE UNITED STATES AND PROTECTED BY THEIR SANCTIONS.

The United States, by the treaty made with the Choctaw nation on October 18, 1820, for considerations accruing to the United States that were most ample, ceded the land now occupied by said nation absolutely and without qualification. The grant of this land was complete by the treaty of 1820.

Choctaw Nation v. U. S., 119 U. S.

The limitations upon the title by which it was made a base or qualified fee were imposed in the treaty of 1830 and in the terms of the patent. It is noteworthy, however, that the grant had become complete and operative before these qualifications were annexed to the title. The purpose of the Choctaw nation in surrendering their lands east of the Mississippi River was not only to acquire lands in the west which the nation should own by indefeasible title, but also to establish a government suitable to their people and to preserve their own peculiar laws

and institutions. It was accordingly provided in the treaty of 1830 that the United States should secure to the Choctaw nation the jurisdiction and government of all persons and property that might be within their limits west and secure the nation against all laws except such as might be enacted from time to time in its own national council not inconsistent with the Constitution, treaties and laws of the United States.

7 U. S. Stat. at L., 333.

By the treaty of 1855, article 7, the Choctaws and Chickasaws were secured in the unrestricted right of self-government and given full jurisdiction over persons and property within their respective limits so far as was compatible with the Constitution of the United States and the laws made in pursuance thereof regulating trade and intercourse with the Indian tribes.

In pursuance of these treaties, the Choctaw nation erected a government modeled after our own State governments, adopted a Constitution, distributed the different powers and developed a body of laws, under which property was accumulated by, and secured to, the citizens of the tribe. The authority under which this government was erected, these laws enacted and such property acquired, was authority emanating directly from the United States. The treaty is analogous to the organic act under which a territorial government may be created. The laws and the course of procedure, legislative and judicial, of the Choctaw nation existed by delegation of power from the government of the United States. The laws and proceedings of the Choctaw nation, in respect of rights and claims arising under them, stood upon the same footing as the laws and proceedings of other territories in the Union. The courts of the country were required to respect their laws concerning property, its descent and the administration of estates and to give effect to them.

Mackey v. Coxe, 18 Howard, 84.

Mehlin v. Ice, 12 U. S. A., 317; 56 Fed. Rep., 12.

The latter case, decided by the United States Circuit Court of Appeals for the Eighth Circuit, is instructive in its considerations of the relations of the Cherokee nation to the United States. Its remarks are as applicable to the Choctaw nation. The Court says:

"The tenure by which the Cherokee nation holds its lands, and its relation to the United States in other respects, are widely different from that of the ordinary Indian tribes. * * * The right of self-government has always been claimed and exercised by the Cherokee nation, and their rights in this regard, so far as relate to their own country and people, have never been questioned by the United States. * * * The social and political condition of the Cherokee nation is imperfectly understood by many. By intermarriage with the whites, they have to a considerable extent come to be of mixed blood. Generations ago they abandoned the chase and the warpath and adopted the pursuits of civilized men. As far back as 1827 they adopted a written Constitution modeled after the Constitutions of the States then surrounding their country. * * * Under their Constitution the government, like that of the States, is divided into three departments, legislative, executive, and judicial, and the functions and jurisdiction of each of these departments is as well defined as it is in the Constitutions of the States. Their judicial system is also modeled after that of the States, and business is conducted in their courts in the same orderly manner."

So complete was the right of self-government conferred upon the Choctaw nation and the other of the Five Civilized Tribes, so capable were these nations of administering their laws, that the United States committed to the exclusive jurisdiction of their courts the trial of citizens of the United States who had become members of the tribe by intermarriage, and permitted the execution of such persons after trial and conviction just as if these powers had been exercised by the States.

Talton v. Mayes, 163 U. S., 197.

The right of the discoverers of coal in the Choctaw nation is a right of property. It is conferred by the Constitution of the Choctaw nation This Constitution was adopted by the unanimous vote of its electors. The right claimed under it

was not called in question for nearly thirty years. Contemporaneous custom and legislative enactment defined and limited the right. The Choctaw nation, by its legislation requiring persons who had mined coal to pay a certain royalty before the same was sold, became a participant in the development of the mining interests and in the profits therefrom. These interests became extensive, and the revenues accruing to the nation therefrom became great in amount. The rights of the owners of coal claims were recognized in the courts of the Choctaw nation; they were upheld and enforced without question in the trial and appellate courts of the United States.

McCurtain v. Grady, 38 S. W., 65.
Atoka C. & M. Co v. Hodges, 19 U. S. A., 407.
Oolagah Coal Co. v. McCaleb, 32 U. S. A., 330.

During more than a quarter of a century Choctaw citizens were allowed to spend money, time and labor in making discoveries of coal and in the development of mining on coal claims. Their rights became the basis of innumerable business transactions, and the division of the public revenue arising therefrom became a matter of convention and agreement between the Choctaw and Chickasaw nations under the sanction of the Interior Department of the United States. These mining rights thus had the sanction of the executive, legislative, and judicial departments of the Choctaw nation, were upheld and vindicated without question in the courts of the United States, and were objects of consideration and sanction by the executive department of the Federal government.

They were also expressly recognized and assented to by the legislation of Congress. Section 6 of the act of March 1, 1889, establishing a court in the Indian Territory, declares the jurisdiction of such court and contains the following provisos:

"Provided, that nothing herein contained shall be so construed as to give the court jurisdiction between persons of Indian blood only.

"And provided further, that all laws having the effect to pre-

vent the Cherokee, Choctaw, Creek, Chickasaw, and Seminole nations, or either of them, from lawfully entering into leases or contracts for mining coal for a period not exceeding ten years, are hereby repealed. Said court shall have jurisdiction over all controversies arising out of said mining leases or contracts and of all questions of mining rights or invasions thereof where the amount involved exceeds the sum of $100."

25 U. S. Stat. at L., 784.

By the act of May 2, 1890, providing a temporary government for the territory of Oklahoma and enlarging the jurisdiction of the United States courts in the Indian Territory, it was enacted: "That the court established by said act (the act of March 1, 1889) shall, in addition to the jurisdiction conferred thereon by said act, have and exercise within the limits of the Indian Territory, jurisdiction in all civil cases in the Indian Territory, except cases over which the tribal courts have exclusive jurisdiction; in all cases on contracts entered into by citizens of any tribe or nation with citizens of the United States in good faith and for valuable consideration, in accordance with the laws of such tribe or nation, and such contracts shall be deemed valid and be enforced by such courts, and in all cases over which jurisdiction is conferred by this act or may hereafter be conferred by act of Congress, and the provisions of this act hereinafter set forth shall apply to said Indian Territory only."

24 U. S. Stat. at L., Sec. 29, p. 93.

In section 31 of the same act it was enacted: "That no attachment shall issue against improvements on real estate while the title to the land is vested in any Indian nation, except where such improvements have been made by persons, companies, or corporations operating coal or other mines, railroads or other industries, under leases or permission of law of an Indian national council or charter or law of the United States."

It will be perceived that by the act of March 1, 1889, all laws preventing the Cherokee, Choctaw, Creek, Chickasaw, and Semi-

nole nations or either of them from entering into leases or contracts for mining coal were repealed. What such laws were or where they existed is not easily answered. But this legislation was doubtless enacted with a view of putting at rest any question of the right of these nations to make such contracts. It would seem to be clear that if the nations could make such contracts they could authorize them to be made by their citizens and ratify the same when made by becoming a party thereto by the issuance of a permit to sell the coal mined upon the payment of the stipulated royalties, which was the actual course of procedure in such cases. But the Congress seemed disposed to avoid the necessity of construction, and to put the question beyond all doubt by the act of 1890. The usage of the Choctaw nation was for the owners of coal claims or discoveries, necessarily Choctaw citizens, to lease the same under contracts for the operation of mines upon such claims; the nations through their national agents also entering into contracts with the lessees or whoever might be the operators of the mines for the payment of stipulated royalties upon the coal sold. These contracts or leases from the individual owners of the coal claims are clearly validated by this legislation, and necessarily if the contract of the owner of the claim under the Indian law was made valid, there must have been the express recognition of his ownership in such claim. The intention of the Congress is further made manifest in section 31 of the act of 1890 with reference to the levy of attachments upon improvements on real estate, such levy being permissible with reference to the improvements made by persons, companies or corporations operating coal mines under a lease, or secondly under permission of law of an Indian national council, or thirdly under charter or law of the United States. There were in this enactment the recognition of three sources of rights as to such improvements: first, the lease of an individual validated by section 29 of the act of 1890; second, the contract of the Indian national council, validated by section 6 of the act of 1889; or third, the charter or law of the United States.

The case of McCurtain v. Grady, supra, is noteworthy not only for its conclusions but for the parties in interest and the counsel representing them and the allegation of right made by them as to coal claims under the Choctaw Constitution, the parties plaintiff including Green McCurtain, subsequently Governor of the Choctaw nation and one of the commissioners negotiating the agreement with the United States in this suit assailed, and N. B. Ainsworth, coal trustee under said agreement, and their counsel including Mr. A. H. Garland, formerly Attorney-General of the United States.

The suit involved the ownership of a coal claim, arising under the constitutional provision, law, usage, and custom set up in this case. The complaint, among other things, alleged that about May 1, 1894, one Krebs, a member of the Choctaw nation, and Philips, one of the plaintiffs, jointly made discoveries of coal, the precise location of the points of discovery being given, and that by reason of such discoveries they became under the Constitution and laws of the Choctaw nation, the absolute owners of all coal being within a radius of one mile in every direction from each one of said points of discovery, and that, through sales and transfers, change of ownership had taken place until the plaintiffs in this action were the owners of the undivided five-eighths of such coal claims and the coal therein, and of all that had been mined upon and taken away therefrom.

The court held that, it being doubtful whether the proper construction of the Choctaw Constitution, article 8, section 18, would allow the discoverer of coal the exclusive right to take all the coal within the prescribed radius, the custom and usage of the nation to allow him the exclusive right to take all such coal was admissible to show that that is the proper construction, citing in support of this position.

Stewart v. Laird, 1 French, 290;

Cohens v. Va., 6 Wheat., 264;

Rogers v. Goodwin, 2 Mass., 475;

Bailey v. Rolfe, 16 N. H., 252;

and the language of Mr. Justice Field in the Eureka case, 4 Sawy., 311, referring to mining laws, with reference to which he said:

"These acts were not drawn by geologists or for geologists; they were not framed in the interest of science, and consequently with scientific accuracy in the use of terms. They were framed for the protection of miners in the claims which they had located and developed, and should receive such construction as will carry out this purpose."

The court did not have before it the act of the Choctaw council passed in 1896, pleaded in full in the complaint herein, clearing up the confusion in the phraseology of the constitutional provision and expressly validating and confirming the rights of coal discoverers and their lessees.

Neither in this case nor in any of the various proceedings in the courts of the United States wherein these mining rights were adjudicated and upheld was any suggestion made that such rights were in contravention of treaty or law. Finally, however, according to the opinion filed by the trial judge, the United States desired to make changes in the political and property rights of the members of the Choctaw nation. As regards their property rights, this could only be done by their consent. Their consent they refused to give. Thereupon oppressive and onerous legislation was enacted, subverting political rights and utterly destructive of property rights, but by the same legislation it was suggested to the Choctaw people that they might escape from the operation of this law if they should ratify an agreement negotiated with commissioners of the United States, but which agreement was utterly repugnant to them. This agreement, called the Atoka agreement, under these circumstances, was adopted by a majority of the votes cast by the electors of the two nations. This agreement swept away the rights in coal discoveries as they had theretofore existed and been recognized, and then, when such agreement could not otherwise be sustained, for the first time in the whole course of legislation and litigation affecting such rights, it was discovered and announced

by the trial court that they had never had any existence, because in contravention of the terms of treaties and other laws of the United States.

We submit that the unqualified grant of 1820 conferred upon the Choctaw nation, in its political and corporate capacity, the ownership of the land now within the limits of the Choctaw and Chickasaw nations; that when the Chickasaw nation by purchase acquired an interest in such land, it became in its corporate and political capacity a tenant in common with the Choctaw nation, its political and governmental powers being limited to the district by subsequent convention assigned to it; that when the United States conferred upon the Choctaw nation the unrestricted right of self-government and full jurisdiction of person and property, it conferred the power of regulating the enjoyment of the property and lands held by the nation; that when the nation, by its constitutional provision with reference to coal discoveries and the law and usage in connection therewith, permitted its citizens to enjoy rights in such discoveries claimed, it was but exercising the full jurisdiction over property conferred by the terms of the treaty; that its power to enact laws emanated from the United States, and the rights arising under such laws are protected by the sanctions of the Constitution of the United States, and that the mining rights as claimed are not in contravention of any law or treaty of the United States.

A consideration of the various grounds upon which these rights are held to be in such conflict will, we think, conduce to their establishment. These grounds, therefore, will be taken up in order.

II.

IS THE EXISTENCE OF THE RIGHT OF DISCOVERERS OF COAL, AS CLAIMED, IN CONFLICT WITH THE LAWS OR THE PROVISIONS OF TREATIES BETWEEN THE UNITED STATES AND THE CHOCTAW NATION?

This question is answered in the affirmative by the trial judge.

It will be recalled that the land now owned by the Choctaw and Chickasaw nations was conveyed by the treaty of 1820 in fee simple, without qualification. The treaty of 1830 required the United States to make a grant to the Choctaw nation "in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it." The patent, which was executed in 1842, conveyed according to the terms of the treaty of 1830, but added the further words, "Liable to no transfer or alienation except to the United States or with their consent." Article 1 of the treaty of 1855 requires the United States to secure and guarantee the lands conveyed to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to hold in common, so that each and every member of either tribe shall have an equal and undivided interest in the whole; provided, further, no part thereof shall ever be sold without the consent of both tribes, and that said lands shall revert to the United States if said Indians and their heirs become extinct or abandon the same. It has been held by this court that the treaties, by which qualifications upon the absolute title granted the Choctaw nation were sought to be imposed, were practically without consideration. United States v. Choctaw Nation, 119 U. S., 313. While the question whether a title absolute was qualified or made defeasible by the later treaties is an interesting one, we do not deem it necessary to do more than suggest its existence.

The trial court held, in view of the above provisions, that the

enjoyment of the right in the coal claim as alleged in the complaint was an appropriation and sale of the realty without the consent of the Chickasaws. The court seems to have overlooked the allegation of the pleading that there had been a complete acquiescence and consent on the part of the Chickasaw nation in the grant of this right by the Choctaw nation; that the division of the royalties resulting from the operation of coal mines under the laws and constitutional provision of the Choctaw nation had been a matter of convention and agreement between the two nations under the sanction of the Interior Department, and that as a result of such agreement the Chickasaw nation received one-fourth of these public royalties, and had for a great number of years through its public authorities accepted the same, and by its legislative authority appropriated them to the uses of that nation (R., 11-12); that the contract under which the defendant Woods was operating, made an exhibit to the complaint in this case, was signed not only by the national agent of the Choctaw nation, but by B. F. Byrd, national agent of the Chickasaw nation (R., 28-29), in pursuance of acts of said nation referred to in the contract.

The trial court further concluded that the enjoyment of this right would be in violation of the clause of the treaty of 1855 providing that the lands should be held in common so that each and every member of either tribe should have an equal undivided interest in the whole. To this position it is replied that nothing in the pleading indicates that the plaintiffs, in the holding of this particular coal claim, were holding in excess of what they would be entitled to by an estimate of what each member might have in all the lands of the two nations. Secondly, that it can not be held in the light of all the provisions of the treaties that the intent of this article was to confer upon the members of the tribes simply a communal interest in all the land without the power to acquire the right of use in any particular part of the land. It is a matter of history that it was and has always been the desire of the government to induce the members of the different Indian tribes to take up the ways of civilized life and

to learn the arts of peace, and especially to make advancement in agriculture. These purposes it was utterly impossible to attain if no member of the tribe could acquire any right to cultivate a piece of ground to the exclusion of any of the other members of the tribe.

The objections that defeat the constitutional provision as to individual interests in a coal mine are just as effectual to defeat any right of an individual member of the tribes in a field, or in a farm, or in a house enjoyed to the exclusion of the other members of the tribe.

The construction placed upon the clauses in question would have been an embargo upon any conceivable progress or development on the part of the nations, from the earliest times in our history known as the "Five Civilized Tribes." It would have made impossible the production of a grain of corn, a bale of hay for cattle or stock, the erection of any permanent structure, or the enjoyment of the lands except in their original and natural state. The contemporaneous and uniform construction of the treaties by the parties in interest is wholly against this view. All the Five Civilized Tribes, holding their lands practically by the same title, provided for the acquisition of individual rights in farms and houses, based upon use and occupancy, for the sale of these by one member of the tribe to another and for their transmission by devise or administration from ancestor to heir.

Durant's Laws of the Choctaw Nation, 247.

Under these local laws and this contemporaneous construction of the treaties a development of the country was made possible, and the rights in farms and other holdings became the subjects of legislative enactment by the Congress of the United States and the objects of litigation in the courts not only of the different nations but in the United States courts. In all this volume of litigation, of legislation and development, it was never suggested that the treaties made it impossible for the members of the tribes to acquire by occupancy and possession

the right to segregate portions of the public domain and to apply it to exclusive individual uses, and to convey such rights to other citizens.

Mehlin v. Ice, supra.
Exendine v. Pore, 12 U. S. A., 402; 56 Fed. Rep., 777.
Wilson v. Owens, 38 S. W., 976; 86 Fed. Rep., 571.
White v. Brown, 38 S. W., 335.
Kelly v. Johnson, 39 S. W., 352.
McCauley v. Hazlewood, 19 U. S. A., 343; 59 Fed. Rep., 877; 24 U. S. Stat. at L., p. 95-96.

In the light of the history of the tribes and of the relations of the United States with them, we think that it is correct to say that the limitations upon the alienation of land were limitations upon the tribes acting in their corporate and political capacity, designed to prevent them from disposing of their lands imprudently, or of transferring them to other sovereignties than the United States; that these limitations were never designed to interfere with the unrestricted right of local self-government and the exercise of full control over the enjoyment of the tribal lands in accordance with the laws that might be enacted by such tribes to regulate such enjoyment, or in accordance with the unwritten custom and usages of such tribes, which are as jealously guaranteed by the treaties against encroachment as were their more formally expressed legislative enactments. This view was never questioned until, as the trial judge says, the government of the United States concluded to wrest the consent to a change of tenures from the Five Civilized Tribes by means of compulsive legislation, which swept away the vast body of rights that had developed under the Indian laws and customs, when, to sustain this legislation and to remove these rights from the protection of the Federal Constitution, it became necessary to hold that there never were rights which an individual member of the tribe could acquire in house, or land, or farm, or pasture, or mine.

Thirdly, if the provisions of the treaties mentioned have the

effect contended for, this effect is removed by the acts of 1889 and 1890, the discovery on which the right in this suit is based being made in November, 1890 (R., 12), and subsequent to the passage of those acts heretofore set out.

We agree with the trial judge that it is immaterial to consider the precise technical classification of the mining right conferred by the constitutional provision and the laws and usage thereunder. The members of the Choctaw nation were not schooled in the niceties of expression, as shown by the treaties enacted with them. Their language was not always exact, and frequently it had to be considered in the light of contemporaneous legislation, exposition, and enactment, and of tribal usage and custom. These customs may be the basis of rights in every system of laws.

Strothers v. Lucas, 12 Peters, 410.
U. S. v. Arredondo, 6 Peters, 715.

It was so when our unlettered forefathers, unable to write deeds, conveyed property by physical investiture and customary law. It should be specially the case with an Indian nation, speaking a language different from ours, and basing many of their most sacred rights on custom.

The requirement by the tribe of the payment of a royalty before the coal mined could be disposed of was in effect the reservation of an interest by the nations in the coal claim and in the coal mined instead of an absolute conveyance or alienation thereof, and in some sense grounded the right of the owners of coal claims in contract. Upon this view the trial court urges that the rights of owners of such claims were revocable by the Choctaw nation, and that the effect of the Atoka agreement was the exercise of such right of revocation. Whether the right of the coal discoverer was indeed revocable by the nation is a question that may be pretermitted until it is determined in what way such right could be revoked, and whether in such way it has in fact been revoked by the Choctaw nation. These questions will be considered in their order.

III.

IF REVOCABLE AT ALL, THE RIGHT OF THE OWNERS OF COAL CLAIMS COULD ONLY BE REVOKED IN THE METHOD PROVIDED BY THE CONSTITUTION AND LAWS OF THE CHOCTAW NATION ADOPTED CONSISTENTLY WITH THE AUTHORITY CONFERRED BY THE UNITED STATES IN ITS TREATIES AND LEGISLATION.

Those treaties authorized the Choctaw nation to erect a government. This the nation did It distributed the powers of the government among the legislative, judicial, and executive branches; it devised a method of procedure for the legislative branch and for the amendment of its Constitution. The Constitution of the Choctaw nation confers the right in question. Its legislative grants have confirmed it. Can this right be modified by any other procedure than that framed for the amendment of the Constitution or the expression of the legislative will? Where rights have been acquired under the Constitution and legislation of the Choctaw nation, acting within the limits of power conferred or permitted by the United States, is the divestiture of such rights by legislation or enactment adopted by other procedure than that in existence when such rights accrued a divesture "by due process" or according to law? There can be but one answer to this question.

We do not deem it material to consider how far the Atoka agreement, adopted by methods unknown to the procedure of the Choctaw nation, might be effectual to change political rights or the political status of the members of the Choctaw nation. The question here presented for determination is how far, by mere enactment, property rights, resting upon most solemn assurances and guaranteed in every mode known to law, can have their essential scope, character and enjoyment modified, changed, and, in some particulars, destroyed? Can property rights be thus affected by a mere vote of a majority of the electors inter-

ested? If so, can this result be accomplished by vote of a majority expressed in no mode of procedure known to the law under which the property rights were developed and upheld? These questions are fundamental. They do not suggest the matter of the wardship or the tutelage of the Indian nations; they do not involve the extent of the power of the general government to legislate in the territories of the Union; they do not raise the inquiry how far political structures, rights, or status may be affected by such legislation. The question here presented is whether there exists in this government a power to modify or change property rights wherever existing, by whomsoever enjoyed, whether white man, black man, Indian, Filipino, or Chinaman, by the mere will of a part of the owners expressed in no mode or form of law existent or provided for in the body of laws under which the rights arose and were upheld. This question can not be answered affirmatively, simply because it would, in this particular instance, affect only Indians, for in this case two of the plaintiffs are citizens of the United States, become members of the nation by inter-marriage, but not losing their citizenship of the United States.

Roff v. Burney, 168 U. S., 218.

It can not be answered affirmatively without disregarding fundamental conceptions of government and of property right as they affect men of all colors and races within the power of the United States.

Murphy v. Ramsey, 114 U. S., 15.
First Nat. Bank v. County of Yankton, 101 U. S., 1047.
Scott v. Sanford, 60 U. S., 719.
McCullough v. Maryland, 4 Wheat., 316.

We submit, therefore, that if the right claimed ever had legal existence because of the constitutional provision of the Choctaw nation, the laws and customs pursuant thereto, such right could only be divested by an amendment to the Choctaw Constitution adopted in the method provided for such amendment, and that the provisions of the Atoka agreement, adopted by methods un-

known to the Choctaw Constitution and laws, upon the proclamation of the governors of said nations issued by virtue of authority nowhere conferred upon them by the laws creating their respective offices or defining their duties, was in nowise the divesting of property "by due process of law."

Field, J., in Railroad Tax Case, 13 Fed. Rep., 752.
Davidson v. New Orleans, 96 U. S., 104.
R'y Co. v. State of Minn., 134 U. S., 981.
Sohier v. Mass. Gen. Hosp., 3 Cush., 493.
In re Jacobs, 98 N. Y., 99.
Dartmouth College Case, 4 Wheat., 662-676.
Memphis v. United States, 97 U. S., 921.
Taylor v. Porter, 4 Hill, 140.
Wynehamer v. People, 13 N. Y., 445-446.
People v. Platt, 17 Johns. (N. Y.), 195.
Westervelt v. Gregg, 12 N. Y., 203.

IV.

THE ATOKA AGREEMENT, ADOPTED BY A MAJORITY OF THE VOTES OF THE ELECTORS OF THE CHOCTAW AND CHICKASAW NATIONS, IS INEFFECTUAL AS A REVOCATION OF THE RIGHTS OF THE OWNERS OF COAL CLAIMS IN VIEW OF THE CIRCUMSTANCES OF DURESS AND COERCION ALLEGED AGAINST THE VALIDITY OF THAT AGREEMENT.

In compelling the adoption of the Atoka agreement, the trial court announces that the United States had in view certain general ends: first, to secure a partition of the lands of the two tribes to their individual members; second, to establish and provide municipal government for cities and towns, and to secure title to the inhabitants of the lands on which their homes and business houses should be built; and third, to place the coal and other minerals of the tribes in the hands of an offi-

cer of the Federal government, to be managed and controlled by him. The trial court declares: "Because of the title and tenure by which these Indian land were held, this legislation was impossible without their consent. They held their lands by fee simple title; they held them by a tenancy in common. Congress had no constitutional power to say to them, 'You shall partition your lands and change the tenure of your holdings.' It could not require them to sell to white men the lands embraced within the limits of the contemplated cities and towns; nor could it take from them the custody and control of their mines. Before this could be done, their consent, because of the title to their realty, was an absolute necessity." (R., 42.)

With these propositions of the trial court we are in entire accord. We believe that no one will question their soundness. But the question presented is, must the consent of the Indians be actual or seeming? Must it be a free consent, or is a coerced and compelled consent sufficient? Again we call attention to the fact that the specific question under consideration is not as to the surrender of political rights which is always a political question, but it is one of property right. The complaint alleges and the demurrer admits that the Indians did not give their free consent to the Atoka agreement; that they were wholly opposed to the agreement; that in order to compel their acceptance of it the Congress of the United States enacted certain most onerous and oppressive legislation, the effect of which was not merely to destroy the governments and Constitutions, to which the Indians were fondly attached, but also to deny them the sanction of laws wherein they could enforce or protect their property rights and interests in whatever form these might exist; that the Congress then provided that the Choctaw people might escape the consequences of this legislation of they would adopt the Atoka agreement. The compulsion placed upon every member of the nation by this legislation was this: so far as property rights were concerned he was made practically an outlaw; no court was authorized to adjudicate or protect them. There was no means by which property could be transmitted

from father to son; the law of ownership and the law of inheritance were alike struck down by the denial of a tribunal in which these rights could be enforced. The compulsion is written at large upon the face of the statutes; it was as far-reaching and as terrible as could be brought to bear upon a people. It presented to the members of the Choctaw nation this question: "Shall we ratify the partition agreement and hold property in a modified form, or shall we reject such agreement and cease to have the rights of property at all?" The trial court meets the contention by suggesting that it is not within the power of the courts to inquire into the motives of a co-ordinate branch of the government. We do not seek to inquire into such motives; we do not in anywise question the integrity of those motives; we are dealing with the mental condition of the owners of property, and with the question whether they surrendered certain rights in that property by their free consent or under compulsion. Granting that their free consent is necessary, we think it entirely immaterial how the compulsion may have arisen. The question is not as to whence the compulsion came nor through what motive applied, but whether it was existent and operative upon the minds of those whose consent to the surrender of property rights is claimed. Suppose that the condition, instead of being the loss of a tribunal in which to vindicate property rights, had been penal and punitory; suppose the Congress, instead of providing that if the agreement were not enacted all safeguards of private property should be withdrawn, should have enacted that the question of the ratification of the agreement should be submitted to a vote of the Choctaw people, and that all those who voted against it should be adjudged guilty of a felony and subject to imprisonment for a term of years, would it be pretended that the question whether those who voted for the agreement under this condition gave their consent to the surrender of property rights freely was not open to inquiry? We would freely concede that where the question is as to the surrender of political rights or institutions the question as to how that surrender is obtained can never be inquired

into by the courts. The surrender of such rights is usually the result of the application of force, and the lawfulness or propriety of this application can not be inquired into by a co-ordinate branch of the government. But where the question is whether individuals have given their consent to the surrender of property rights, and such consent is essential to the validity of such surrender, it would seem that the question should always be open whether that consent be a free and actual consent or not, and that the method by which it is compelled, whether by legislation or otherwise, is entirely immaterial.

The principle is thus stated by Justice Field: "Courts can not inquire into the motives of legislators except as they may be disclosed on the face of acts or inferable from their operation considered with reference to the condition of the country and existing legislation."

Soon Hing v. Crowley, 113 U. S., 703.

As we have said, the coercion is written at large upon the face of the statutes. The Choctaw and Chickasaw people were deeply attached to their own laws, courts and institutions. By the act of Congress, approved June 7, 1897, the jurisdiction of the courts of the Choctaw and Chickasaw nations as theretofore existing, was taken away, and was, after January 1, 1898, to be vested in the United States courts in the Indian Territory; but by said act it was provided that said nations could avoid the effect of this provision by entering into an agreement on or before January 1, 1898, with the commission to the Five Civilized Tribes theretofore appointed on the part of the United States to treat with said tribes. Said commissioners were appointed and framed the Atoka agreement, but the people of the two nations preferred to lose their courts rather than adopt such agreement, and the same was rejected by the council of the Chickasaw nation and never submitted to the council of the Choctaw nation. Thereupon the jurisdiction of the courts of said nation became vested in the United States courts on and after January 1, 1898.

The Congress of the United States, in the act of June 28,

1898, adopted the scheme of legislation applicable to the tribes and known as the "Curtis Law," and at the same time took up, amended, and ratified the Atoka agreement and provided for its submission to the qualified electors of said nations. At the same time it enacted, "That on and after the passage of this act (the Curtis law) the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory." The tribes were given until the 1st day of December, 1898, in which to hold an election, as provided, and ratify the Atoka agreement. Thereupon, the provisions of the Curtis law, in conflict with the agreement, were to become inoperative. The agreement provided for the revesting of jurisdiction in the Choctaw courts and thereby furnished tribunals for the enforcement of the Choctaw laws, whose enforcement was inhibited to the United States court, the sole depository of jurisdiction unless the agreement were adopted.

It will be noted that the complaint alleges and the demurrer admits that the commission of the United States, appointed to treat with the Five Civilized Tribes after the adoption of the act of Congress of June 28, 1898, and the ratification by Congress of the Atoka agreement, continuously declared to the members of the tribes by private, public, and published utterances, that unless said agreement were adopted the United States would not only enforce the provisions of the act of June 28, 1898, but would adopt more stringent and radical legislation affecting said tribes and the members thereof, and that these statements coupled with the legislation enacted had the effect of coercing the members of the tribes into voting for the ratification of said agreement. (R.. 23-24.)

V.

THE ACT OF CONGRESS OF JUNE 28, 1898, AND THE ATOKA AGREEMENT ARE BOTH VOID BECAUSE OF THE FACT THAT IN THE ENACTMENT OF THE ONE AND IN THE RATIFICATION OF THE OTHER BY THE CONGRESS AND IN THE PROVISION THAT THE AGREEMENT SHOULD SUPERSEDE THE ACT IF ADOPTED AT AN ELECTION HELD IN THE CHOCTAW AND CHICKASAW NATIONS, THE CONGRESS OF THE UNITED STATES DELEGATED ITS LEGISLATIVE POWER, IN VIOLATION OF SECTIONS 1 AND 7 OF ARTICLE 1 OF THE CONSTITUTION OF THE UNITED STATES.

The act of June 8, 1898, was formally adopted as law by the Congress of the United States. It contained a comprehensive scheme of legislation affecting property rights, political rights, the existence and duration of the Choctaw governments, the jurisdiction of courts. Nearly everything that could be the subject of legislation was affected by this act. The Atoka agreement, negotiated between the commissioners of the United States and the commissioners of the Choctaw and Chickasaw nations, likewise embodied a comprehensive scheme of legislation as general and far-reaching in its character as the Curtis law, but essentially and radically different from that act in many vital particulars. It would be difficult to conceive of an act of legislation touching in a greater variety of ways a greater volume of rights, powers and privileges than the act of Congress on the one hand and the Atoka agreement on the other. At the same time that the Congress passed its act it provided for an election, at which the qualified electors of the Choctaw and Chickasaw tribes of Indians were to vote, and enacted that if the majority of the whole of such votes should be in favor of the agreement the same should be held to be adopted, and that the provisions of the Curtis act should only apply to said tribes

where the same did not conflict with the provisions of said agreement. Let us note a few things wherein the act of Congress and the agreement differ.

Under the act of Congress the tribal courts were still divested of the jurisdiction which had been taken from them by the act of June 7, 1897. This jurisdiction affected the entire enforcement of the criminal law against members of the tribes, the protection of personal property, the administration of estates, the determination of civil controversies. By its act Congress evinced its judgment that the Indian courts should no longer have this jurisdiction. By the Atoka agreement the great mass of this jurisdiction was restored to the tribal courts. By the act of Congress the enforcement of the tribal laws was inhibited to the United States courts, and such laws could not be enforced anywhere else because there were no courts having jurisdiction. The agreement, by restoring the tribunals, restored this mass of law applicable to all the variety of rights and relations. The act of Congress provided for the allotment of the surface of the land; the agreement provided for the allotment of the land in fee. In many other respects did the two acts conflict. What did the Congress in effect say by its adoption of the one act and its contingent adoption of the other? It said to the members of the Choctaw and Chickasaw nations: "We have exercised our legislative judgment and discretion and embodied it in our act. Your discretion and your judgment may be different from ours. If a majority of your people entertain different views of policy and so express yourselves in the election to be held, then our legislative judgment shall yield to yours; our act shall be inoperative in whatever particular it conflicts with the act ratified by you. We will adopt two schemes of legislation in essential and open conflict, repugnant in vital matters, affecting property rights, the jurisdiction of courts, the body of laws that shall be operative. You may make choice of which you prefer. We delegate to you to say whether you like one system or the other, and according to your choice and judgment, the one system or the other shall be operative. We leave to you to say whether the jurisdiction to enforce the criminal law for your

people shall remain where it now is, in the courts of the United States, or shall be transferred to your courts. We leave to you to say whether the laws defining crime among your people shall be the laws of the United States as now, or shall be the laws of the Choctaw nation. We leave to you to say whether your laws establishing and upholding property rights shall be operative or whether there shall be no laws touching these rights." It seems to be beyond the power of controversy that here is a delegation of authority. If the Congress had only ratified the Atoka agreement, and then made its operation contingent upon its ratification at an election to be held in the Choctaw and Chickasaw nations, the question would have been raised whether the submission of the law to a popular vote is simply making the operation of such law contingent upon a future event and not a delegation of legislative authority. The whole weight of reason and the preponderance of authority is against such method of enacting law.

Field v. Clark, 143 U. S., 442.
Parker v. Conn (Penn.), 47 Am. Dec., 480.
State v. Swisher, 17 Texas, 441.
Bartow v. Imrod, 59 Am. Dec., 50.
Cooley's Const. Lim., 139-142, et seq.

This question, however, is not the question presented by the facts. The Congress exercised its judgment in the act adopted by it. It then delegated to the Choctaw and Chickasaw nations to modify, to change, and, in important and vital particulars, to annul its act by the adoption of the agreement. Suppose the Congress of the United States had directed that its own act and the Atoka agreement be voted upon by the electors of the Choctaw and Chickasaw nations, and that that one should be the law which received a majority of the votes, would anyone question whether this was a delegation of legislative authority? Did it not just as directly delegate its authority in the actual case by submitting the agreement to the vote of the Choctaw and Chickasaw electors, and providing that its own act should be annulled if such agreement were adopted? Because it is im-

possible to say which of these two acts represents the judgment of the Congress, as the enactment of the one and the ratification of the other were contemporaneous, it seems to us that both should be declared ineffectual and void, because of the impossibility of knowing which scheme of legislation received the legislative sanction.

The trial court considered that in submitting the agreement to the ratification of the tribal electors the Congress simply made the operation of law dependent upon a future contingency. The doctrine is entirely specious and unsound which holds that the result of a popular vote is a contingency. Such doctrine leads to palpable evasions of the duty devolved upon representatives in a representative government. But it is not deemed necessary to consider this question at any length, because the case does not raise the question of this method of adopting legislation. The case here presented is that of the adoption of a comprehensive scheme of legislation by the Congress and the delegation of power to an entirely different agency and judgment to modify, change, and annul the congressional legislation.

Neither is the trial court correct in invoking the doctrine of local option laws or the power of particular communities to determine local questions of taxation or improvement affecting such community alone. The exercise of these powers the States can properly delegate to municipal corporations or to the communities. But the determination of these local questions will not be confounded with the delegation of power to adopt comprehensive schemes of legislation affecting the jurisdiction of courts, the enforcement of civil and criminal laws, and all the rights of property and all the public and private relations.

It is hardly necessary to state that the appellate jurisdiction of this court is invoked in the first instance because the cause presents a constitutional question.

All of which is respectfully submitted.

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No. 136.

Brf. of McLoud for Appellees.

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Supreme Court of the United States,

OCTOBER TERM, 1899.

W. H. ANSLEY, M. H. GLEASON, AND R. O. EDMONDS .....*Appellants,*

v. **No. 136.**

N. B. AINSWORTH, L. C. BURRIS, O. E. WOODS, JAMES ELLIOTT, AND THE OLA COAL AND MINING COMPANY .....*Appellees.*

APPEAL FROM THE UNITED STATES COURT IN THE INDIAN TERRITORY.

Brief of Appellees.

J. W. McLOUD,
Counsel for Appellees.

ARKANSAS DEMOCRAT CO.

IN THE

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QUESTION OF JURISDICTION.

The appellees have entered a special appearance and filed a motion to question the jurisdiction of the court to proceed further in this case, and in support thereof submit the following:

The record discloses the fact that this case was brought directly from the trial court to this court, and it becomes pertinent, therefore, to inquire whether this court at this time has any jurisdiction to pass upon the issues here presented. The United States Court in Indian

Territory was created by act of Congress dated March 1, 1889 (25 Stat. at L., 783). May 2, 1890 (26 Stat. at L., 81), Congress passed an act "enlarging the jurisdiction of the United States Court in the Indian Territory, and for other purposes," and provided in the forty-second section thereof that appeals and writs of error might be taken and prosecuted from the decision of the United States Court in Indian Territory to the Supreme Court of the United States in the same manner and under the same regulations as from the circuit courts of the United States, except as otherwise provided.

This act was passed prior to the act creating the United States Circuit Courts of Appeals under the act of March 3, 1891 (26 Stat. at L., 826), which, by its fifth section, deprived that court of jurisdiction of cases of this character, and provided for appeals direct to the Supreme Court of the United States.

March 1, 1885 (28 Stat. at L., 693), Congress passed an act providing for the appointment of additional judges of the United States Court in Indian Territory, and in section 11 of said act constituted the judges of the United States Court in Indian Territory a court of appeals, and invested said court with such jurisdiction and powers in Indian Territory, and such general superintending control over the courts thereof as is conferred upon the Supreme Court of Arkansas over the courts thereof, by the laws of said State. It will be seen that by the terms of this act the Court of Appeals of Indian Territory was not in its appellate jurisdiction deprived of the consideration of cases of this character. By this act it was intended by Congress to create and establish in Indian Territory a judicial system similar, as far as possible, to the system existing in the State of Arkansas, and unless some express provision can be found in the acts of Congress authorizing and providing for appeals or writs of error directly from the trial courts in Indian Territory to the Supreme Court of the

United States, a review of the decisions of the trial courts must be first had in the court of appeals in Indian Territory before being taken to the Supreme Court of the United States.

This court has held in the case of *Brown v. U. S.*, 171 U. S., 631, 637, decision by Justice Shiras, that "the decisions of the court of appeals in the Indian Territory (under the act of 1895) are final except so far as they are made subject to review by some express provision of law. In the eleventh section of this act of March 1, 1895, it is provided that 'appeals and writs of error from the final decisions of said appellate court (in Indian Territory) shall be allowed, and may be taken to the circuit court of appeals for the Eighth Judicial Circuit, in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States;' but it is not claimed by counsel for plaintiff in error that this provision applies to capital cases." Neither can it be claimed that this provision of this act applies to cases involving the constitutionality of any law of the United States, or of the validity or construction of any treaty made under its authority, because in cases of this character, the United States circuit courts of appeals are deprived of jurisdiction in the same section (section 5) of the act of 1891, that deprives that court of jurisdiction of capital cases.

Under this view of the law, and under the authority of *Brown v. U. S.*, 171 U. S., 631, 637, the appeal in this case should have been taken to the court of appeals in Indian Territory.

Or, if we adopt the other theory, which is supported by the case of *Brown v. U. S.*, that the court of appeals in Indian Territory is analogous to the Supreme Court of the District of Columbia, and bears the same relation to the trial courts in Indian Territory as the Supreme Court of the District of Columbia bears to the trial court in the District of Columbia, it must also be held that the decision of

the court of appeals in Indian Territory, if the appeal had been taken there, would have been final.

Brown v. U. S., 171 U. S., 631, 637.

Ex parte Bigelow, 131 U. S., 328, 329.

In re Heath, 144 U. S., 42.

Cross v. Burke, 146 U. S., 82, 84.

The act of March 1, 1895, was intended to give the court of appeals in that Territory appellate jurisdiction of all cases from the trial courts in Indian Territory. Take, for instance, the question of capital cases: Prior to the act of 1895, the trial courts in Indian Territory did not have jurisdiction of such cases, but were given jurisdiction of them by that act, and this court held in the case of *Brown v. U. S.*, above cited, on pages 636, 637, that this gave the court of appeals in Indian Territory appellate jurisdiction over said cases. "Of course, as, when this act was passed (act of 1891), the United States court in Indian Territory had no jurisdiction over capital crimes, Congress did not contemplate any appeal or writ of error in such cases (in the act of 1891, creating the United States courts of appeals), and when by the act of March 1, 1895, jurisdiction of the United States court in Indian Territory was extended to capital cases, and the court of appeals was established with power to entertain appeals and writs of error, the act of March 3, 1891, cannot be regarded as applicable to such cases. Where a statute provides for a writ of error to a specified court of appeals, it must be regarded as the repeal of any previous statute which provides for a writ of error to another or different court."

Again, in the case of *Stephens v. Cherokee Nation*, 174 U. S., on page 481, the court said: "The act of March 1, 1895, provided for the appointment of additional judges of the United States court in Indian Territory, and created a court of appeals, with such superin-

tending control over the courts in the Indian Territory as the Supreme Court of Arkansas possessed over the courts of that State by the laws thereof." Thus clearly intending, as above stated, to create and establish in Indian Territory an appellate court analogous, as far as possible, to the Supreme Court of Arkansas or to the supreme court of a State; and hence appeals from the trial courts, except in the two classes of cases provided for in the act of July 1, 1898, hereafter referred to, should be taken to the court of appeals in Indian Territory, and except in said two classes of cases no appeals can be taken to this court from the trial courts in Indian Territory.

In the Indian appropriation bill, approved July 1, 1898 (30 Stat. at L., p. 591), Congress provided that "appeals shall be allowed from the United States courts in the Indian Territory direct to the Supreme Court of the United States, to either party, *in all citizenship cases, and in all cases between either of the five civilized tribes and the United States,* involving the constitutionality or validity of any legislation affecting *citizenship, or the allotment of lands,* in the Indian Territory, under the rules and regulations governing appeals to said court in other cases."

We understand this court to have decided, in the case of *Stephens v. Cherokee Nation,* 174 U. S., 445, that this provision of the act of 1898 authorized appeals direct from the trial court to the Supreme Court of the United States only in two classes of cases:

First. Citizenship cases.

Second. Cases between either of the five civilized tribes and the United States.

And that these two classes of cases can only be heard in the supreme court on the question of the constitutionality or validity of the legislation affecting *citizenship* or the *allotment of lands* in Indian Territory.

As the case at bar is not within the two classes of cases named in the act of 1898, as defined by this court in the case just referred to, we think it should be governed by the provisions of the act of March 1, 1895, creating the court of appeals in Indian Territory, and that the appeal should have first been taken to that court.

The act of 1895 certainly supersedes the provisions of section 5 of the act of 1891, creating the United States Court of Appeals, which provides that "appeals or writs of error may be taken from the district or circuit courts direct to the supreme court, * * * in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question," so far as appeals or writs of error from Indian Territory are concerned.

As this case does not come within the two classes of cases which the act of 1898, above referred to, provides shall be taken from the trial courts in Indian Territory direct to the Supreme Court of the United States, but is governed by the act of 1895, which in legal effect provided that the court of appeals established in Indian Territory should have appellate jurisdiction of all cases of which the trial courts in Indian Territory had jurisdiction, we do not think the court has jurisdiction in this case, for the reason that the appeal was taken from the trial court direct to this court, instead of to the court of appeals in Indian Territory.

STATEMENT OF FACTS.

The facts of this case upon which the issues are based are as follows:

It is claimed that on November 7, 1890, appellants, Gleason and Edmonds, non-citizens of the Choctaw nation, and one Lorin A. Riddle, a citizen by blood of the Choctaw nation, discovered coal, and

thereby acquired in a coal claim an exclusive and perpetual right to the same, to themselves and their assigns, under section 18 of article 17 of the Choctaw constitution, which reads as follows:

"Any citizen of this nation who may find any mine or mines or mineral water shall have the exclusive right and privilege *to work the same* so long as he may choose, within one mile in any direction from *his works or improvements*," etc.

That on February 28, 1898, the said Lorin A. Riddle conveyed his undivided one-third interest in said coal claim to appellant, W. H. Ansley, an Indian citizen by blood.

That appellants, Gleason, Edmonds and Ansley, made a lease of said coal mine to appellee, O. E. Woods, for the working of said coal mine, and that the said Woods in turn made a lease to the Ola Coal and Mining Company, a corporation, for the working of the same; that under said lease appellants Gleason, Edmonds and Ansley were to receive a royalty, as provided by the laws of the Choctaw Nation.

The act of Congress of June 28, 1898, known as the "Curtis law," which contained and ratified, as amended, an agreement with the Choctaw and Chickasaw nations, known as the "Atoka Agreement," which was afterwards ratified by the people of said nations on the 24th day of August, 1898, canceled and annulled all individual leases in the Choctaw Nation, and prohibited anyone from paying, and individuals from receiving, any royalty on coal, and provided that all of the royalty should be paid into the treasury of the United States for the benefit of the tribe, and drawn therefrom under such rules and regulations as should be prescribed by the secretary of the interior, and that all leases for the working of coal should be entered into between the persons or corporations desiring to mine coal and the mining trustees of the Choctaw and Chickasaw nations, such leases to be approved by the secretary of the interior.

This suit is brought to enjoin the appellees, O. E. Woods, James Elliott, and the Ola Coal and Mining Company, from entering into a lease with appellees, N. B. Ainsworth and L. C. Burris, mining trustees of the Choctaw and Chickasaw nations, and to test the provisions of said act of Congress and the Atoka agreement contained therein, which canceled and annulled individual leases and abolished individual royalties.

The principal provisions of the Atoka agreement, which abolished individual leases and individual royalties, is found in Vol. 30 U. S. Stat. at L., p. 510:

"It is agreed that all coal and asphalt within the limits of the Choctaw and Chickasaw nations shall remain and be the common property of the members of the Choctaw and Chickasaw tribes, so that each and every member shall have an equal and undivided interest in the same. * * * All agreements heretofore made by any person or corporation with any member or members of the Choctaw and Chickasaw nations, the object of which was to obtain such member or members' permission to operate coal or asphalt, are hereby declared void. * * * No royalties shall be paid except into the United States treasury, as herein provided."

BRIEF AS TO THE LAW ON THE MERITS OF THE CASE.

As this court has held, in the case of *Stephens v. Cherokee Nation,* that appeals from the trial courts in Indian Territory to the Supreme Court of the United States lie only in citizenship and allotment of land cases, and that these can be considered by the court only for the purpose of determining the constitutionality and validity of the legislation affecting them; and as the court has held in the same case that the act of Congress in question in this case is valid and con-

stitutional, it is probably unnecessary for us to do more than cite that case. But as the brief for the appellants goes into the merits of the case at length, we have thought best to meet all of the propositions advanced, so that if the court holds that it has jurisdiction, and that the merits of the case can be inquired into, it may be conclusively shown that the appellants have no case on the merits, or law.

In the discussion of the case on the merits, we deem it unnecessary to go into an extended statement of the history of the Choctaw and Chickasaw tribes of Indians. This history is doubtless familiar to every member of this court and every student of American institutions. It may be conceded that the attorneys for the appellants have stated fairly and fully the provisions of the Choctaw constitution, and the articles of treaties between the United States government and the Choctaw tribes of people which bear upon the subject-matter of this controversy.

The first proposition submitted by the appellants is that the right of coal discoverers in the Choctaw Nation under the Choctaw constitution, is a vested right when measured and tested by the constitution and laws of the United States. In order, therefore, to bring to the notice of the court the point of the first contention, we submit the following proposition:

I.

The right of coal discoverers and their assigns, under the provision of the Choctaw constitution, is not a vested right, and could be taken away, either by the Choctaw legislature or by the people of the Choctaw Nation, as was done in this particular case.

In order to arrive at a clear understanding of these matters it is necessary to discover first what power and authority the government

of the United States exercises, and has a right to exercise, over the Indian tribes known as the five civilized tribes, one of which is the Choctaw Nation. From the earliest decisions of this court down to the present time it has been uniformly held that these tribes are separate dependent sovereignties, subject to the control and power of the United States government. Indeed, it was said by Mr. Chief Justice Marshall, in *Cherokee Nation v. Georgia,* 5 Pet., 1, 17, that these Indian tribes "are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and domain of the United States that any attempt to acquire their lands or to form a political connection with them would be considered by all as an invasion of our territory and an act of hostility." The learned chief justice who gave expression to this utterance understood the peculiar relations which these Indians bore to the United States government as few men understood them, and so far as we have been able to ascertain, the position which Chief Justice Marshal assigned to these tribes, politically and socially, in the above-mentioned case, has never been modified by subsequent decisions of this court.

We think the constitutionality and validity of the act of Congress in question is upheld and every question in this case decided against the contention of appellants by this court in the case of *Stephens v. Cherokee Nation,* 174 U. S., 445, from which we shall quote at length later on, but before doing so refer to the following decisions:

In the case of the *United States v. Kagama,* 118 U. S., 375, 379, this court, by Justice Miller, said:

"But these Indians (Cherokees) are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties,

and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these. The territorial governments owe all their power to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified or repealed at any time by Congress. * * * This power of Congress to organize territorial governments and make laws for their inhabitants arises not so much from the clause in the constitution in regard to disposing of and making rules and regulations concerning the territories and other property of the United States, as from the ownership of the country in which the territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else." Citing *Murphy v. Ramsay,* 114 U. S., 15, 44.

In the case of the *United States v. Rogers,* 4 How., 567, the relation of these tribes to the United States government was stated with brevity and with great clearness. The learned chief justice in that case said:

"It is true that it is occupied by the tribe of Cherokee Indians, but it has been assigned to them by the United States as a place of domicile for the tribe, and they hold and occupy it with the assent of the United States and under their authority. * * * We think it too firmly and clearly established to admit of dispute that the Indian tribes residing within the territorial limits of the United States are subject to their authority."

This court, by Mr. Justice Harlan, in the case of *Cherokee Nation v. Kansas Railway Co.,* 135 U. S., 641, after citing the decision of Chief Justice Marshal, above quoted, and the decision in the case of the *United States v. Rogers,* and after quoting the above extract from the *Kagama* case, on page 655 quotes further from that case, as follows:

"They (meaning these Indian tribes) were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided. * * * The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it has never existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

In this *Cherokee Nation* case, Justice Harlan (on the same page) further says:

"The latest utterance upon this general subject is in *Choctaw Nation v. U. S.*, 119 U. S., 1-27, where the court, after stating that the United States is a sovereign nation, limited only by its own constitution, said: 'On the other hand, the Choctaw Nation falls within the description in the terms of our constitution, not of an independent State or sovereign nation, but of an Indian tribe. As such, it stands in a peculiar relation to the United States. It was capable, under the terms of the constitution, of entering into treaty relations with the government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes, to exert its legislative power.' "

Justice Harlan, in the *Cherokee Nation* case, above cited, on page 654, says further:

"By the treaty of New Echota, 1835, the United States covenanted and agreed that the lands ceded to the Cherokee Nation should at no future time, without their consent, be included within the territorial limits or jurisdiction of any State or territory, and that the government would secure to that nation 'the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country, belonging to their people, or such persons as have connected themselves with them;' and, by the treaties of Washington, (1846 and 1866), the United States guaranteed to the Cherokees the title and possession of their lands, and jurisdiction over the country. (Revision of Indian Treaties, pp. 65. 79. 85.) But neither these nor any previous treaties evinced any intention, upon the part of the government, to discharge them from their condition of pupilage or dependency, and constitute them a separate, independent, sovereign people, with no superior within its limits."

This court, in the *Choctaw Nation* case, 119 U. S., 27, quotes from the *Kagama* case as follows:

"These Indian tribes are the wards of the nation; they are communities *dependent* on the United States; *dependent* largely for their daily food; *dependent* for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill-feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessnesss, so largely due to the course of the dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive,

and by Congress, and by this court, whenever the question has arisen."

In the case of *Thebo v. The Choctaw Tribe of Indians,* 27 U. S. App., 661, in a decision by Judge Caldwell of the Eighth Circuit, it is stated:

"While the nation (meaning the Choctaw Nation) has many of the attributes of the political unit which constitutes the civil and self-governing community called the 'State' or 'nation,' it is not a sovereign State, but is a domestic and dependent State, subject to the jurisdiction and authority of the United States."

The general power of Congress over these Indian tribes is luminously stated and upheld by this court in the case of *Stephens v. Cherokee Nation,* 174 U. S., 445, in a decision by Chief Justice Fuller. This Cherokee Nation case involved the constitutionality of the Curtis Law under consideration in the case at bar, and practically all of the legislation of Congress affecting the Choctaw and Chickasaw tribes of Indians, and sustains the Atoka agreement contained in said Curtis Law. On pages 484, 485, 486, Chief Justice Fuller epitomizes the decisions of the supreme court heretofore quoted, and also all other decisions of the supreme court in relation to these Indian tribes, as follows:

"As to the general power of Congress we need not review the decisions on the subject, as they are sufficiently referred to by Mr. Justice Harlan in *Cherokee Nation v. Southern Kansas Railway Company,* 135 U. S., 641, 653, from whose opinion we quote as follows:

" 'The proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, or in the sense that the several States are sovereign, and that that nation alone can exercise the power of eminent domain within its limits, finds no support

in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the acts of Congress defining the relations of that people with the United States. From the beginning of the government to the present time, they have been treated as 'wards of the nation,' 'in a state of pupilage,' 'dependent political communities,' holding such relations to the general government that they and their country, as declared by Chief Justice Marshall in *Cherokee Nation v. Georgia,* 5 Pet., 1, 17, 'are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility.' It is true, as declared in *Worcester v. Georgia,* 6 Pet., 515, 557, 569, that the treaties and laws of the United States contemplate the Indian Territory as completely separated from the States and the Cherokee Nation as a distinct community, and (in the language of Mr. Justice McLean in the same case, p. 583) that 'in the executive, legislative and judicial branches of our government we have admitted, by the most solemn sanction, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a State, or separate community.' But that falls far short of saying that they are a sovereign State, with no superior within the limits of its territory. By the treaty of New Echota, 1835, the United States covenanted and agreed that the lands ceded to the Cherokee Nation should at no future time, without their consent, be included within the territorial limits or jurisdiction of any State or territory, and that the government would secure to that nation 'the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country, belong-

ing to their people or such persons as have connected themselves with them;' and, by the treaties of Washington, 1846 and 1866, the United States guaranteed to the Cherokees the title and possession of their lands, and jurisdiction over their country. Revision of Indian Treaties, pp. 65, 79, 85. But neither these nor any previous treaties evinced any intention, upon the part of the government, to discharge them from their condition of pupilage or dependency, and constitute them a separate, independent, sovereign people, with no superior within its limits. This is made clear by the decisions of this court rendered since the cases already cited. In *United States v. Rogers*, 4 How., 567, 572, the court, referring to the locality in which a particular crime had been committed, said: 'It is true that it is occupied by the tribe of Cherokee Indians, but it has been assigned to them by the United States as a place of domicile for the tribe, and they hold and occupy it with the consent of the United States, and under their authority. * * * We think it too firmly and clearly established to admit of dispute that the Indian tribes, residing within the territorial limits of the United States, are subject to their authority.' In *United States v. Kagama*, 118 U. S., 375, 379, the court, after observing that the Indians were within the geographical limits of the United States, said: 'The soil and the people within these limits are under the political control of the government of the United States, or of the States of the Union. There exists within the broad domain of sovereignty but these two. * * * They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they

resided. * * * The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it has never existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.' The latest utterance upon this general subject is in *Choctaw Nation v. United States,* 199 U. S., 1, 27, where the court, after stating that the United States is a sovereign nation limited only by its own constitution, said: 'On the other hand, the Choctaw Nation falls within the description in the terms of our constitution, not of an independent State or sovereign nation, but of an Indian tribe. As such, it stands in a peculiar relation to the United States. It was capable under the terms of the constitution of entering into treaty relations with the government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes, to exert its legislative power.' "

"Such being the position occupied by these tribes (and it has often been availed of to their advantage), and the power of Congress in the premises having the plentitude thus indicated, we are unable to perceive that the legislation in question is in contravention of the constitution."

In view of these decisions, we think it cannot be seriously questioned at this day that the power of the Federal government over these Indian tribes is plenary and that the Federal government, acting through its legislative authority, is the sole judge as to what is best

for the Indians and most conducive to their welfare. The word "pupilage" which has often been used by this court to express the relation which these Indians bear to the Federal government, was used advisedly and expresses, to our mind, that relation with more clearness and exactness than any other word could possibly do. It was never intended that these Indian tribes should erect governments which at any time should be superior to and independent of the power of the United States government. It is true that in the treaties referred to in appellants' brief, the United States did guarantee to these tribes, among which was the Choctaw Nation, the unrestricted right of self-government, and did thereby give to these tribes the authority to distribute the powers of government in any way they might see fit, provided such government erected by them and the distribution of its powers were not in conflict with our system of government. But nowhere, either in the treaties or in the adjudications of this court, can any expression be found which indicates that the United States government ever at any time intended to surrender its control over these tribes and its power to determine what was best for their present and future welfare. The adjudications of this court have been followed up and given support by the Congress of the United States, and the legislation of that body for fifty years has been uniformly directed to the control and supervision of these tribes. It is fruitless, therefore, to enter into a more extended discussion of the power of the Federal government over these Indian tribes. That power has been so often defined, both by the courts and by congressional legislation, that it may be said, as above stated, to be in every sense plenary.

Assuming, then, that the government of the United States still retains its control and supervision over these tribes, we are justified in further assuming that all treaties which have been made between

the United States government and these Indian tribes were made with a view to their protection both as against the encroachment of the white man and as against themselves. It is well known and a part of the public history of the country, that when the lands now occupied by these tribes were assigned to them by the United States, they were a semi-civilized people. They had followed the chase and the war path, and it was intended by the government, by means of subsequent treaties, to bring them to an appreciation of civilized government and to encourage in them a love of our institutions. These Indians, at the time the treaty of 1820 and the treaty of 1830 were entered into, had no knowledge of the value of real estate and did not know the good which flows from organized government. Their laws were made up of custom and tradition, and they were not, at the time these treaties were entered into, in a situation to manage their own affairs, including their landed interests, without the supervision of the Federal government.

Knowing their political and social conditions at the time the treaty of 1855 was entered into between the Choctaw people and the United States government, we must conclude that the language of that treaty was chosen with much care and was intended to express as exactly as language could express the tenure by which these Indians held their lands. The language of the treaty of 1855, article 1, is as follows:

"And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to hold in common so that each and every member of either tribe shall have an equal, undivided interest in the same; *provided,* however, no part thereof shall ever be sold without the consent of both tribes and that said lands

shall revert to the United States if said Indians and their heirs become extinct, or abandon the same."

The language of this treaty is, "to hold in common so that each and every member of either tribe shall have an equal, undivided interest in the same."

We think the language of this treaty clearly establishes a tenancy in common between the members of the Choctaw and Chickasaw tribes; and being tenants in common, each one is entitled to an equal, undivided share of all of the lands. Why was it that this language was used? Why was not the title fixed in the Choctaw and Chickasaw Nations as corporate or political entities or tribes, and not in the members of those nations? The answer seems to us to be obvious. When the United States government by treaty declared that these Indians should be tenants in common as to their lands, it meant that this landed estate should remain intact, incapable of partition or alienation until the United States government should give its consent. The guaranty of the United States government that each and every member of either the Choctaw or Chickasaw tribes shall have an equal, undivided interest in all the lands assigned to them, would be set aside and destroyed if the contention of appellants is correct, and would be subversive of the policy pursued by this government towards the Indians for more than half a century. It is true that the constitution of the Choctaw Nation, section 18, article 7, provides as follows: "Any citizen of this nation who may find any mine or mines or mineral waters, shall have exclusive right and privilege to work the same, so long as he may choose, within one mile in any direction from his works or improvements; *provided,* however, he does not interfere with the rights of a former settler;" but if this constitutional provision is to be construed as giving to each Choctaw citizen who discovers a mine upon the lands of his

tribe the exclusive right to occupy an area of land two miles in diameter perpetually through himself and his descendants, it must amount in law to an appropriation and acquisition by that citizen of that much land. This result would be just what the treaty was intended to avoid.

The right to work the coal granted the discoverer of coal and the right to lease the same, if he had such right, could only continue during the existence of the tenancy in common; and whenever the tenancy in common should be dissolved by the action of the tribe, or its people, or by act of Congress, these rights and privileges immediately ceased. Under the most liberal view of this provision of the Choctaw constitution, it is bound to be true that the discoverer of coal and his lessees or grantees, necessarily took the same subject to the implied limitation and condition that their rights were to continue only during the existence of the tenancy in common.

And even under this view, it cannot be held that these individual leases should continue until partition and allotment actually takes place, because the Indians themselves, in the agreement entered into by their representatives, known as the "Atoka agreement," which is embodied in the Curtis bill, and which by the Curtis bill was ratified by Congress and subsequently ratified by the Choctaw people, canceled these individual leases instanter.

Article 2 of the treaty of September 27, 1830, provides that:

"The United States, under a grant especially to be made by the president of the United States, shall cause to be conveyed to the Choctaw Nation, a tract of country west of the Mississippi River, in fee simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it."

7 Stat. at L., 333.

On March 23, 1842, in pursuance of this treaty, a patent was

executed by the United States to the Choctaw tribe of Indians, the granting clause of which is as follows:

"Know ye, that the United States of America, in consideration of the premises, and in execution of the agreement and stipulations of the aforesaid treaty (1830), have given and granted, and by these presents do give and grant unto the said Choctaw Nation, the aforesaid tract of country west of the Mississippi River, to have and to hold the same, with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging, as intended to be conveyed by the aforesaid article, in fee simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it, *liable to no transfer or alienation except to the United States, or with their consent.*"

If the right granted to the discoverer of coal by the Choctaw constitution is one in perpetuity, and such discoverer has the power to transfer this right in perpetuity to another in the form of a lease, as is claimed in this case, it is in fact an alienation of the property and is in violation of this provision of the patent between the United States and the tribe. The individual leases in controversy in this case are not merely grants of possession but are grants of the property itself. Under all the authorities, the coal in the ground is part of the real estate—is real property. These leases are therefore an alienation of the property and in violation of the provisions of the patent. These leases do not merely grant the use of the property, but they grant the property itself—the coal, which is by the lessee taken and removed.

We think, therefore, that it is fair to assume that the provision of the Choctaw constitution above mentioned was not intended to confer a property right as against all the other members of the Choctaw tribe, but was intended simply to confer upon the citizen

such use as would not be inconsistent with or destructive of the title guaranteed in section 18, article 17, of the treaty of 1855, and the patent of 1842. In other words, it must have been intended by the Choctaw people, when they adopted this constitutional provision, that it should not be in conflict with any treaty or law of the United States, and we must construe this constitutional provision in connection with the treaty and patent. If the members of the Choctaw tribe are tenants in common, and these tenants in common agree that some member of their tribe shall occupy a certain portion of the land for the purpose of developing the same and yielding a revenue which would go to all the members of the tribe, certainly the tenant in common so occupying such land could not resist a partition by setting up that his use was a perpetual use and that as to the land occupied by him he was practically its owner. The true theory is that these coal lands lying within the limits of the Choctaw Nation were valuable sources of revenue to the tribe, and the Choctaw people intended to encourage the citizens to discover these mines, and to that end gave them the use and enjoyment of the same; but in view of the treaties above mentioned, and in view of the language of the Choctaw constitution above set out, we cannot believe that this use and enjoyment was intended to be perpetual and thereby to work an ouster of the other members and a destruction of their interests in the land so used and enjoyed. If we are correct in this, then it is a mere waste of words to argue that appellees had no vested right in these mines.

The phrase "vested right" has been the subject of much discussion; but nowhere, either in the Federal constitution or in the adjudications of this court, is there any attempt to define exactly what this phrase means. This much seems to be settled, as was decided in the case of *State v. Newark,* 3 Duch., 197, "Courts do not regard

rights as vested contrary to the equity and justice of the case;" or, as was said in the case of *Foster v. Essex Bank,* 16 Mass., 245, "A party cannot have a vested right to do wrong."

Tested by these rules, can it be said that it would be right and just for members of the Choctaw tribe, who have discovered mines and worked them under the permission given by the Choctaw constitution, to hold these mines and the lands covered by them perpetually as against all of the other members of the Choctaw tribe? If this were true, then the lands of the Choctaw people would be owned by a few members, because, as a matter of public history, it is well known that a large proportion of the lands of the Choctaw people are coal lands and they are by far their most valuable lands, and if coal discoverers having the capital and energy to occupy these mines and work them should be permitted to own them by virtue of the constitutional provision above quoted, the result would be disastrous to the other members of the tribe whose interest the treaty of 1855 was clearly intended to protect. This construction would work a great wrong to the Choctaw people as a whole, and we do not believe that any vested right could possibly result from the perpetration of such wrong.

For the reasons above given, the right claimed by appellants, never was and never could become a vested right, for the reason that the discoverer of coal, and his lessee or grantee, were necessarily subject to the implied and inherent right and power of the Choctaw Nation and its people to take the same away at any time. It cannot be that one of the tenants in common, and his grantees (non-citizens of the Choctaw Nation, as are all of the appellants except Ansley) could acquire a vested right that could exist after the nation itself ceased to exist and after the tenacy in common had been dissolved by the action of the nation and the people themselves. It cannot

be that any right exists under this constitutional provision that is greater than the nation itself and beyond the power of the nation and its people, or the power of Congress, and the power of the Choctaw Nation, its people, and Congress combined, to repeal and take away. The individual Indian taking a right under this constitutional provision, and being himself a tenant in common with all the other Indians of his tribe, necessarily took the same subject to the controlling power of the other tenants in common.

We submit further that, owing to the peculiar relations existing between these Indian tribes and the government of the United States, as hereinbefore fully set forth, and as expressed in treaties, acts of Congress and decisions of the courts; and the fact that these Indians are the wards of the government; and in view of the superintending control and guardianship which the government has always exercised over them, an individual Indian could not acquire a vested right, which was beyond the power of Congress to change, alter, amend, or take away.

Leaving the question, therefore, of *vested right,* we come to the second proposition which we beg to submit.

II.

The provision of the Choctaw Constitution above quoted, does not give to the discoverer an irrevocable license.

Waiving the question at this time whether the Choctaw Nation would have the power to grant an irrevocable license, we confidently assert that the words of the constitutional provision and the situation of the parties do not justify the conclusion that the license to the discoverer was irrevocable. The rule is that a contract, even though

reduced to writing, giving the right to mine ore, does not convey the title to the land. It is a mere license. See *Silsby v. Trotter*, 29 N. J. E., 228; *Shepherd v. McCalmont Oil Co.*, 38 Hun., 37. The Choctaw Nation granted a privilege to one of its members. It could not compel that member to work the mine he discovered for a year, for a day, not even for an hour. The discoverer had a right, under the law, to abandon his mine at any time he saw fit. It would be therefore a curious doctrine that one person could be held to a contract as irrevocable, and the other retain power of revocation at any moment he might desire to exercise it. It is elementary that agreements in general must be mutual and obligatory on both parties. Tested by this rule, we conclude that inasmuch as the discoverer had a right to quit when he saw fit, the Choctaw Nation had a right to revoke his license when it should determine to do so. The trial judge whose opinion is copied in the transcript in this cause (pp. 38 to 52) considered this constitutional provision as a contract between the Choctaw Nation and the discoverers, and argued that, inasmuch as there was a want of mutuality between the parties, the contract was void, or, if not void, certainly revocable.

It seems to us that the trial judge might have added that if this constitutional provision is to be construed as a contract between the Choctaw Nation and one of its members, there is no inhibition in the Federal constitution against the impairment of that contract by the Federal Congress. As was said in the case of *Evans-Snyder-Buell Co. v. McFadden*, decided recently by the Eighth Circuit Court of Appeals, and not yet printed, however much the question might have been mooted, it is now settled that the inhibition in the Federal constitution against the impairment of contracts is a limitation upon the powers of the State government, and not upon the powers of the Federal government. So that when the United States

government declared, as it did in the act of June 28, 1898, that all coal lands of the Choctaw and Chickasaw tribes should be segregated from the balance of the domain and held in trust by the United States government as a source of perpetual revenue for all the members of those tribes, it enacted a law which it had the constitutional power to enact and which by reason of its sovereignty and supervision over these Indians no person has a legal right to question. It follows, then:

First. That the right claimed by the appellants is not a vested right, because it would work great wrong and injury to the Choctaw people, and because the Choctaw tribe of Indians, being tenants in common, and each individual member of the tribe being entitled to an equal and undivided share of all of the property of the tribe, and because of the superintending power and control over the Indians by Congress, an individual Indian could not acquire a vested right as against the other tenants in common, nor as against the tribe itself, nor as against the government of the United States.

Second. That this right granted by the Choctaw constitution was a revocable one, and has been revoked, as we shall show hereafter, in an appropriate and legal manner. And,

Third. That if this provision operates as a contract between the Choctaw Nation and the discoverer, its obligations can be impaired and its legal effect set aside by an act of Congress.

The learned judge who decided the case below contended that if the constitutional provision above set forth is to be given the force and effect claimed for it by appellants, it would be in conflict with the laws of the United States and the treaties made with the Choctaw Nation. The argument of the trial judge upon that question is so lucid that we will quote at length from the same, commencing at the bottom of page 47:

"Article 1 of the treaty of 1855, after defining the boundaries of the Choctaw and Chickasaw nations, provides as follows:

" 'And pursuant to an act of Congress, approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to hold in common, so that each and every member of either tribe shall have an equal undivided interest in the whole. *Provided,* however, no part thereof shall ever be sold without the consent of both tribes, and that said lands shall revert to the United States if said Indians and their heirs become extinct or abandon the same.'

"Article II of the treaty of 1866 in part provides:

" '*Whereas,* the land occupied by the Choctaw and Chickasaw nations, and described in the treaty between the United States and said nations of June 22, 1855, is now held by the members of said nation in common,' etc. Whether the treaty of 1855 be taken as an interpretation of the terms of the grant made by the parties to it or as the engrafting of a new condition in it is immaterial, because, in any view of the case, after the execution of the treaty its terms would be binding. Therefore the United States had been treating with the Choctaws alone in relation to their lands. Now a new party in interest appears. The Chickasaws, with the consent of the United States, had bought an interest in them, and it became necessary to define the rights and title of all.

"I think there can be no doubt but that these Indians hold their lands as tenants in common, at least since the treaty of 1855; but by that treaty the United States is made to guarantee to each Indian an enjoyment of an equal undivided share of these lands, and the Choctaws agree with the Chickasaws that it shall be done.

"The constitution, containing the provision by virtue of which

the plaintiff claims title, was not adopted until 1860, five years after the treaty of 1855 was ratified, and neither the United States nor the Chickasaw Nation were parties to it.

"The United States had the right, by virtue of its superior sovereignty over these Indian tribes and its guardianship over their wards, which has always been recognized, to make such an agreement with them and enforce it.

"If the eighteenth section of article 7 of the Choctaw constitution was intended to vest an indefeasible title to the coal mines in the discoverer, it would be in violation of two of the provisions of the treaty of 1855. First, it would be an appropriation and a sale of the realty without the consent of the Chickasaws; and, second, it would be in violation of that clause of the treaty which provides that the lands shall be held in common, so that each and every member of either tribe shall have an equal, undivided interest in the whole.

"There is no limitation in the constitution as to the number of mines which a discoverer may own and appropriate to himself. The language is, 'Any citizen of this nation who may find any mine or mines,' etc., clearly giving to him the use of all he may discover. The records of the clerk's office of this court disclose that three of the most influential members of the Choctaw Nation, all high officers of the government, on one day executed to a St. Louis coal company twenty-eight leases of coal claims, each of the twenty-eight embracing a circular area of land the diameter of which was two miles, about 2,000 acres each, and this probably did not include one-half of their claims. If one man should acquire them all his title to the whole would be as perfect as if he had discovered but one. Diamond drills have been run into nearly all of the coal lands of this nation, and wherever the drill would discover coal in paying quantities, the holes

have been named in their paper claims and leases as monuments marking the center of each two-mile claim. Of course, this is going out of the record, for these facts are not in proof, but I merely mention them to show what the contention of the plaintiff leads to and how gravely this interpretation of the Choctaw constitution would be at variance with article I of the treaty of 1855, and the treaty between the United States and the Choctaws and Chickasaws having been adopted prior to the Choctaw constitution, if they conflict, the terms of the treaty must prevail; and if it be true that it was intended by this article of the constitution to convey an indefeasible title to the discoverer, so that he may hold the realty for all time against the will of the other tenants in common and of the Chickasaw Nation and the United States, there is a conflict between it and the treaty.

"I therefore hold that if the language of the constitution is to be construed as granting to the discoverer of mines in the Choctaw Nation an indefeasible title or right to the mine discovered by him as to the underlying coal, it is void as being in conflict with the treaty of 1855" (Tr., pp. 47, 48, 49).

It is further claimed by appellants in proposition three of their brief, that if the right granted by the Choctaw constitution to the discoverer is revocable at all, the right could only be revoked by amendment to the Choctaw constitution. It might be said, with some show of reason, that, in organized communities where personal and property rights are regulated by constitutions and laws, a majority of the community could not force a minority to surrender the rights of government and, incidentally, the rights of property. It is undoubtedly true that under our theory of government property rights are not determined by majority votes of the people, but are determined by the adjudications of courts organized for that pur-

pose; but while the general principles announced by appellants in their brief as to the exercise of these powers by the people, and the manner in which they shall be exercised, may be correct insofar as property rights are affected, they can have no application to a case like the one at bar. If it be conceded that the right granted by the Choctaw constitution was revocable in any manner, then it seems that a majority of the people who established the constitution giving the right could adopt any method it saw fit for taking it away, especially if the method was approved by the United States Congress.

III.

The court cannot inquire into the motives of Congress in Passing the Curtis Law, nor of the Indians in ratifying it—These are legislative and not judicial questions.

The appellants further complain that the Atoka agreement, which was adopted by a majority of the people of the Choctaw Nation and the Congress of the United States, was not a fair thing, because it was attended with circumstances of duress and coercion against the Choctaw people. When the Atoka agreement, which was made by and between representatives of the United States and the Indian tribes through agents lawfully appointed for that purpose, was presented for adoption, the United States government had reached the conclusion that the time was at hand for a partition of the lands held by the members of the tribes in common and for a settlement once for all of the vexatious questions which continually arose in the Indian country. This agreement was submitted fairly and openly, after full notice to the people of the Choctaw and Chickasaw nations, and they by a large majority adopted it, thereby giving

their consent in the best and most satisfactory way known to the people. It is beyond the power of this court to question the good faith of Congress, and it is never to be presumed that an act of a legislature is not *bona fide*. As was said by Chief Justice Fuller, in the case of *U. S. v. Old Settlers*, 148 U. S., 466, in reviewing the case of *U. S. v. Arredonda*:

"It will be perceived that this decision is not authority for the proposition that a court may be clothed with power to annul a treaty on the ground of fraud or duress in its execution. * * * * Unquestionably a treaty may be modified or abrogated by an act of Congress, but the power to make and unmake is essentially political and not judicial, and the presumption is wholly inadmissible that Congress sought in this instance to submit the good faith of its own action or the action of the government to judicial decision."

In the case of *Whitney v. Robertson*, 124 U. S., 190, 194, Justice Field states with approval the effect of the decision of *Taylor v. Morton*, 2 Curtis, 454, 459, as follows:

"Whether the consideration of a particular stipulation of the treaty had been voluntarily withdrawn by one party so that it was no longer obligatory on the other; whether the views and acts of a foreign sovereign had given just occasion to the legislative department of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise, were not judicial questions; that the power to determine these matters had not been confided to the judiciary, which has no suitable means to exercise it, but to the executive and legislative departments of our government; and that they belong to diplomacy and legislation, and not to the administration of the laws. And he (Curtis) justly observed, as a necessary consequence of these views, that if the power to determine these matters is vested in Congress, it is wholly imma-

terial to inquire whether by the act assailed it has departed from the treaty or not, or whether such departure was by accident or design, and, if the latter, whether the reasons were good or bad. In these views we fully concur."

Mr. Chief Justice Chase, in the case *ex parte McCardle*, 7 Wall., 514, uses the following language:

"We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the constitution, and the power to make exceptions to the jurisdiction of this court is given by express words."

So, also, Chief Justice Marshall, in the case of *Fletcher v. Peck*, 6 Cranch, 332, in discussing this subject, says:

"It may well be doubted how far the validity of a law depends upon the motives of its framers and how far the particular inducements operating on the members of the supreme sovereign power of a State to the formation of a contract by that power are examinable in a court of justice. If the principle be conceded that an act of the supreme sovereign power might be declared null by a court in consequence of the means which procured it, still there would be much difficulty in saying to what extent those means must be applied to produce this effect. * * * If a majority of the legislature be corrupted, it may well be doubted whether it be within the province of the judiciary to control their conduct, and if less than a majority act from impure motives, the principle by which judicial interference would be regulated is not clearly discerned."

To say that a court, except in extraordinary cases, has the power to question the good faith of the action of the legislative department of the government would be subversive of our theory of government. We conclude, therefore, that any effort to attack the validity of this agreement on the ground of duress or coercion, which is not manifest

on the face of the laws themselves, but which rests only in the tender and enlightened conscience of appellants' counsel, is nothing less than an absurdity.

"The treaties referred to in the argument were all made and ratified prior to March 3, 1871 (the date of the act in question in that case); but it is 'well said that an act of Congress may supersede a prior treaty, and that any questions that may arise are beyond the civil and judicial cognizance, and must be met by the political department of the government.' *Thomas v. Gay*, 169 U. S., 264, 271, and cases cited."

Stephens v. Cherokee Nation, 174 U. S., 445, 483, 484.

IV.

The act of Congress of June 28, 1898, and the Atoka agreement contained therein, were properly enacted, and are valid and constitutional laws, according to their terms.

The act of Congress and the agreement or treaty with the Choctaw tribe of Indians, the validity of which is in controversy in this action, is an act entitled "An Act for the Protection of the People of the Indian Territory, and for Other Purposes" (30 Stat. at L., p. 495), known as the "Curtis Law," that part of which, after the first paragraph of section 29, on page 505, to the bottom of page 513, comprises what is known as the "Atoka agreement," being the agreement that was entered into by representatives of the United States and representatives of the Choctaw and Chickasaw tribes, on the 23d day of April, 1897, as amended by Congress in this act of June 28, 1898. The balance of the act relates to the agreement with the Creek Nation, and has no bearing upon this case. Section 29 (30 Stat. at L., p. 505) provides:

"That the agreement made by the commission to the five civilized tribes with commissions representing the Choctaw and Chickasaw tribes of Indians, on the 23d day of April, 1897, as herein amended, is hereby ratified and confirmed, and the same shall be of full force and effect if ratified before the 1st day of December, 1898, by a majority of the whole number of votes cast by the members of said tribes at an election held for that purpose; and the executives of said tribes are hereby authorized and directed to make public proclamation that said agreement shall be voted on at the next general election, or at any special election, to be called by such executives for the purpose of voting on said agreement; and at the election held for such purpose all male members of each of said tribes qualified to vote under his tribal laws shall have the right to vote at the election precinct most convenient to his residence, whether the same be within the bounds of his tribe or not; *provided,* that no person whose right to citizenship in either of said tribes or nations is now contested in original or appellate proceedings before any United States court, shall be permitted to vote at said election; *provided, further,* that the votes cast in both said tribes or nations shall be forthwith returned duly certified by the precinct officers to the national secretary of said tribes or nations, and shall be presented by said national secretaries to a board of commissioners consisting of the principal chief and a national secretary of the Choctaw Nation, the governor and national secretary of the Chickasaw Nation, and a member of the commission to the Five Civilized Tribes, to be designated by the chairman of said commission; and said board shall meet without delay at Atoka, in the Indian Territory, and canvass and count said votes and make proclamation of the result; *and if said agreement as amended be so ratified, the provisions of this act shall then only apply to said tribes where the same do not conflict with the provisions of said agree-*

ment; but the provisions of said agreement, if so ratified, shall not in any manner affect the provisions of section fourteen of this act."

It is contended by appellants in their fifth proposition that the Atoka agreement and the act of Congress of June 28, 1898, are both void by reason of the fact that the act of June 28, 1898, was passed by Congress prior to the adoption of the Atoka agreement, and the alternative was submitted to the Choctaw people of adopting the Atoka agreement which, if adopted, should supersede the act of Congress, and, if not adopted, the act of Congress should remain in force.

It is claimed that this was a delegation of legislative authority by the Congress of the United States in violation of sections 1 and 7, of article 1, of the constitution of the United States. Here, again, the appellants invoke a correct general principle, but one which is not applicable to the facts of this case. When the act of June 28, 1898, was passed by the Congress of the United States it carried with it also the Atoka agreement which was in advance ratified by Congress. Congress then said, in effect, to the Choctaw people, "Here we have passed a law known as the 'Curtis Act,' which provides a comprehensive scheme for the settlement of your difficulties. We prefer, however, that you adopt an agreement which has been negotiated between the representatives of the United States government and the representatives of your people. This agreement, known as the 'Atoka agreement,' if adopted by a majority of your people, shall become the act of Congress applicable to you. If you refuse to adopt the Atoka agreement—and you are to act freely and without compulsion in this matter—the Curtis bill is still effective."

The case of *Stephens v. Cherokee Nation,* 174 U. S., 445, is an exhaustive consideration of the constitutionality and validity of the Curtis Law and the Atoka agreement, as well as of all other legisla-

tion and treaties affecting the Five Civilized Tribes; but we quote only that part of the opinion relating to the act of Congress under consideration in this case. In the statement of the case, Chief Justice Fuller, on page 466, says:

"Section 29 (of the Curtis Law) ratified the agreement made by the commission with the commissions representing the Choctaw and Chickasaw tribes, April 23, 1897, as amended by the act, and provided for its going into effect if ratified before December 1, 1898, by a majority of the whole number of votes cast by the members of said tribes at an election held for that purpose."

In the opinion of the court, Chief Justice Fuller, on page 491, says:

"The act (the Curtis Law) provided further for the resubmission of the two agreements with certain specified modifications, that with the Choctaws and Chickasaws, and that with the Creeks, for ratification to a popular vote in the respective nations, and that if ratified, the provisions of these agreements so far as differing from the act should supersede it. The Choctaw and Chickasaw agreement was accordingly so submitted for ratification August 24, 1898, and was ratified by a large majority, but whether or not the agreement with the Creeks was ratified does not appear. * * *

"The agreement with the Choctaw and Chickasaw tribes contained a provision continuing the tribal government, as modified, for the period of eight years from March 4, 1898; but provided that it should 'not be construed to be in any respect an abdication by Congress of power at any time to make needful rules and regulations respecting said tribes.'

"For reasons already given *we regard this act in general as not obnoxious to constitutional objection.* * * *

"The elaborate opinions of the United States court in the Indian

Territory by Springer, J., Clayton, J., and Townsend, J., contained in these records, some of which are to found in the report of the Commissioner of Indian Affairs for 1898, page 479, consider the subject in all its aspects, and sets forth the various treaties, tribal constitutions and laws, and the action of the many tribal courts, commissions and councils which assumed to deal with it, but we have not been called on to go into these matters, as our conclusion is that we are confined to the question of constitutionality merely.

"As we hold the entire legislation constitutional, the result is that all the *judgments must be affirmed.*"

It is clear that Congress had the power to abrogate all treaties made with these Indian tribes and to pass the Atoka agreement and make it a law without the consent of the Indian tribes. It has been repeatedly held by this court, that an act of Congress may supersede a treaty, and a treaty may supersede an act of Congress, as was held in this court in the *Cherokee Tobacco case,* 11 Wall., 616-621:

"The effect of treaties and acts of Congress, when in conflict, is not settled by the constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty (citing authorities). In the case referred to, these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere

of judicial cognizance. In the case under consideration, the act of Congress must prevail as if the treaty were not an element to be considered."

This view was also clearly stated by Justice Field in the case of *Whitney v. Robertson,* 124 U. S., 190, 195.

"It follows, therefore, that when a law is clear in its provisions, its validity cannot be assailed before the courts for want of conformity to stipulations in a previous treaty not already executed. Considerations of that character belong to another department of the government. The duty of the courts is to construe and give effect to the latest expression of the sovereign will. In *Head Money Cases,* 112 U. S., 580, it was objected to an act of Congress that it violated provisions contained in treaties with foreign nations, but the court replied that so far as the provisions of the act were in conflict with any treaty, they must prevail in all the courts of the country, and after a full and elaborate consideration of the subject, it held that 'so far as a treaty made by the United States with any foreign nation can be the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal.' "

But Congress did not desire, evidently, to adopt such harsh measures, so it gave to the Indians an opportunity of making an agreement with the United States government which should be satisfactory to the Indians, and in preparation of which the Indians should take a conspicuous part. If Congress had the power originally to pass the Atoka agreement without the consent of the Choctaw and Chickasaw people, it certainly had the power to make it a law when these people by a majority vote consented to the same, and it cannot therefore be said that Congress delegated its legislative authority to the Choctaw and Chickasaw people when it in effect said to such

people, "We have a law here known as the 'Curtis Law,' which will become effective or not upon the happening of a future event, viz: the adoption or non-adoption by you of what is known as the 'Atoka agreement.' " The law books are practically unanimous in declaring that conditional legislation based upon the happening of a future event is not unconstitutional. Mr. Sutherland, in his work on *Constitutional Construction,* uses this language:

"If an act is adopted by the legislature as a law, and, pursuant to its provision, it is submitted to the people and on their expression of approval or disapproval as a fact or event the act by its terms does or does not take effect, the only question is whether the legislature can pass a law to take effect on such a contingency. The authorities would seem now to have established the doctrine, though not universally, that the result of a popular vote is a contingency on which laws may be enacted to take effect."

Mr. Cooley, in his work on *Constitutional Limitation*, 6th Ed., p. 137, says: "A statute may be conditional, and its taking effect may be made to depend upon some subsequent event." This expression is founded on the case of *Brig Aurora v. U. S.,* 7 Cranch, 382.

The appellants' counsel confuses the passage of the law with its operation. The Atoka agreement was complete when it passed; only the operation was contingent. The remarks of Coulter, J., in *Com. v. Painter,* 10 Pa. St., 214, 216, are peculiarly applicable to this case and are in part as follows:

"A strong illustration of the faculty of the legislative power in this respect may be found in the act of Congress of the 9th of July, 1846, submitting the question of the retrocession of the county of Alexandria, in the District of Columbia, to the State of Virginia, to a vote of the qualified electors of that county. Virginia had previously enacted a law signifying her willingness to take back the

county, whenever the same should be receded by the Congress of the United States. Congress enacted the law of the 9th of July, 1846, submitting the question to the qualified electors and providing the machinery for the election, and enacting that, if a majority of the electors shall be against accepting the provisions of the act, it shall be void and of no effect; but if a majority of votes shall be in favor of accepting, then it shall be in full force. And in that event, it shall be the duty of the president to inform the governor of Virginia of the result of the election, and that the law is consequently in force. Many of the most profound constitutional lawyers in the Union were in Congress at that time, and the State of Virginia never hesitated to accept the retrocession, because the Congress of the United States delegated to the people the decision of the question."

In the case of *Bank of Rome v. Village of Rome,* 18 N. Y., 38, it is held that an act of the legislature which, by its terms, is to take effect immediately, but which confers on certain municipal officers certain powers not to be exercised until the inhabitants of the municipality have approved the act by vote, is constitutional, and is not a delegation of legislative power. See, also,

People v. Salomon, 51 Ill., 37, 52, 53, 54, 55.

Clark v. Rogers, 81 Ky., 43.

State v. Parker, 26 Vt., 357.

State v. O'Neal, 24 Wis., 149.

In the Wisconsin case it was contended further that as the law was not to go into effect unless ratified by the people, it was not in force for the purpose of authorizing an election, and was not in force for any purpose when the election was held. The act fixed the time for holding the election, and provided that the vote should be returned and canvassed, etc., and that "if a majority of the votes cast at such election upon such question shall be in favor of a board of

public works, the mayor shall make proclamation of the fact, and thereupon this act shall take effect and be in force from and after the 1st day of May, 1869," being the same in meaning as the provisions on this subject in the Curtis Law and Atoka agreement under consideration in this case.

The case last cited decided clearly that while the legislature cannot delegate power to enact laws, it may provide that whether or not a law enacted shall be operative may be made to depend upon the popular will.

The case of *People v. McFadden*, decided by the Supreme Court of California, and reported in 81 Cal., 489, 22 Pac. Rep., 851, presents a clear discussion of the question under consideration. There the act provided that if less than two-thirds of the qualified electors voted in favor of the creation of the new county, the act should cease to be of any force or effect. The act itself was passed and approved and became a perfect law, and the repeal of the law was to take place if less than two-thirds of the electors voted in favor of the creation of the new county. The act known as the "Curtis Law" became a law, perfect and complete, but this law was not to be effective as against the Choctaws and Chickasaws if they adopted the Atoka agreement within the prescribed time. It seems therefore that the California case and the case at bar are practically parellel. The court in the California case above cited, page 53, says:

"But it further claimed that if the act does not delegate to the people the power to create the law, it does delegate to them the power to repeal it by reason of the sentence, 'if at such election less than two-thirds of the qualified electors voting for and against the creation of the proposed county, vote for the creation of said county, then this act shall cease to be of any force and effect,' and that by reason thereof the whole act is void. If the effect of this sentence

was as claimed, to delegate to the people the power to repeal the act, a complete and perfect answer to the objection would be that the sentence might be stricken out entirely without affecting any other portion of the act. This being so, the presence of this sentence would not render the whole act void. But we do not think that such was the force or effect of this clause. The law was complete and in force the moment it was approved by the governor. It provided for the different steps and stages of proceedings in carrying it into effect. One of its provisions was that when it had reached a certain stage in these proceedings, which stage must be reached within a time limited by the legislature, further proceedings under it should depend upon the happening of an event which might or might not happen, to-wit: the favorable vote of the electors. If that event or contingency happened, then all the remaining provisions of the act were to be carried into effect, and this, too, was to be done within the time limited by the act. If the event did not happen, then by its own terms no further provisions of the act were to be carried into effect. Not only had the legislature the power to provide upon what condition or contingency the provisions of the act might be carried into effect, but also to provide within what time it must be done, if done at all, and it may have been a wise provision, in view of the rapid changes taking place in the conditions of the surrounding country and the numbers of its people, to say that, 'If you do not choose to accept the permission granted by the provisions of this act within the time herein named, it shall not remain an open permit to be accepted at any future time.' * * * Whatever may have been the reason which moved the legislature thereto, it did not delegate to the people the power to repeal the act, but itself said that if the provisions of the act were not accepted within the period named, they should not thereafter be carried into effect.

"The event or change of circumstances on which a law may be made to take effect must be such as, in the judgment of the legislature, affects the question of the expediency of the law—an event on which the expediency of the law in the opinion of the lawmakers depends. On this question of expediency the legislature must exercise its own judgment definitely and finally. When a law is made to take effect upon the happening of such an event, the legislature in effect declares the law inexpedient if the event should not happen, but expedient if it should happen. They appeal to no other man or men to judge for them in relation to its present or future expediency. They exercise that power themselves and then perform the duties which a constitution imposes upon them."

Cooley Const. Lim., 144.

We, therefore, respectfully urge that there is no merit in the contention of appellants, and submit that this case should be affirmed.

We call the attention of the court to the opinion of the learned trial judge, which can be found in full in the transcript herewith filed, and which is a careful and exhaustive discussion of all the points raised by the appellants in their brief.

Respectfully submitted,

J. W. McLOUD,

Counsel for Appellees.

Supreme Court of the United States.

No. 136.—October Term, 1900.

W. H. Ansley, M. H. Gleason and R. O. Edmonds, Appellants,
vs.
N. B. Ainsworth, L. C. Burriss, O. E. Woods, James Elliott, and the Ola Coal and Mining Company.

Appeal from the United States Court in the Indian Territory.

[February 11, 1901.]

This was a bill filed in the United States Court in and for the Central District of the Indian Territory by W. H. Ansley, M. H. Gleason and R. O. Edmonds against N. B. Ainsworth, L. C. Burriss, O. E. Woods, James Elliott and the Ola Coal and Mining Company, alleging: That Ansley was by blood a member and citizen of the Choctaw Nation of Indians; that Gleason and Edmonds were citizens of the United States by birth, who by intermarriage with members of the Choctaw Nation had become citizens of that nation; that Ainsworth was a citizen of the Choctaw Nation and Burriss a citizen of the Chickasaw Nation; that Woods and Elliott were citizens of the United States; and that the mining company was a corporation organized under the laws of Kansas, engaged in operating a mine in the Choctaw Nation, Elliott being president, and Woods general manager, thereof.

The bill averred that in November, 1890, Gleason and Edmonds and one Riddle, a citizen by blood of the Choctaw Nation, discovered coal, and acquired an exclusive and perpetual right to a coal claim to themselves and their assigns under section eighteen of article seven of the Choctaw Constitution; the laws, usages and customs of that nation; and acts of the Choctaw Council; and that in February, 1898, Riddle conveyed his undivided one-third interest in the coal claim to Ansley.

That Gleason, Edmonds and Riddle, in 1896, contracted with Woods to work the mine, and that Woods contracted with the mining company for the working of the same, and that under the agreements Gleason, Edmonds and Riddle were to receive a royalty.

That Ainsworth and Burriss were coal trustees designated by the governors of the Choctaw and Chickasaw Nations, respectively, and appointed by the President, under the act of Congress of June 28, 1898, 30 Stat. 510, c. 517, which act ratified an agreement with the Choctaw and Chickasaw Nations, known as the "Atoka Agreement," also afterwards ratified by the

people of said nations, and operated to annul all individual leases and to prohibit the payment to or receipt by individuals of any royalty on coal, and provided that all royalties should be paid into the Treasury of the United States for the benefit of the tribes, to be drawn therefrom under such rules and regulations as should be prescribed by the Secretary of the Interior, and that all leases for the working of coal lands entered into by and between persons or corporations desiring to mine coal and the mining trustees of the Choctaw and Chickasaw Nations should be approved by the Secretary of the Interior.

The bill was filed to enjoin Woods, Elliott and the mining company from entering into a lease with Ainsworth and Burriss, mining trustees of the Choctaw and Chickasaw Nations, and denied on various grounds the constitutionality and validity of the provisions of the act of Congress.

The United States Court for the Central District of the Indian Territory, Clayton, J., presiding, held that there was no equity in the bill, and sustained a demurrer thereto, and, complainants declining to plead further, dismissed the bill with costs, whereupon an appeal was allowed to this court.

Mr. Chief Justice FULLER delivered the opinion of the Court:

The objection of want of jurisdiction over this appeal meets us on the threshold.

By the act of March 1, 1889, entitled "An act to establish a United States court in the Indian Territory, and for other purposes," 25 Stat. 783, c. 333, a court was established with a single judge, whose jurisdiction extended over the Indian Territory, and it was provided that two terms of said court should be held each year at Muscogee in that Territory, and such special sessions as might be necessary for the dispatch of business in said court at such time as the judge might deem expedient.

May 2, 1890, an act was passed "To provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States Court in the Indian Territory, and for other purposes," 26 Stat. 81, 93, 94, c. 182, §§ 29, 30 and 31, which defined the Indian Territory; gave additional jurisdiction to the court in that Territory as therein set forth; and, for the purpose of holding terms of the court, divided the Territory into three specified divisions.

By section five of the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, as amended, appeals or writs of error might be taken from the District and Circuit Courts directly to this court in cases in which the jurisdiction of the court was in issue; of conviction of a capital crime; involving the construction or application of the Constitution of the United States; and in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, was drawn in question.

By section six, the Circuit Courts of Appeals established by the act were invested with appellate jurisdiction in all other cases.

The thirteenth section read: "Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States, or to the Circuit Court of Appeals in the Eighth Circuit, in the same manner and under the same regulations as from the Circuit or District Courts of the United States, under this act."

March 1, 1895, an act was approved entitled "An act to provide for the appointment of additional judges of the United States Court in the Indian Territory." 28 Stat. 693, c. 145. This act divided the Indian Territory into three judicial districts, to be known as the Northern, Central and Southern Districts, and provided for two additional judges for the court, one of whom should be judge of the Northern District, and the other judge of the Southern District, and that the judge then in office should be judge of the Central District. The judges were clothed with all the authority, both in term time and in vacation, as to all matters and causes, both criminal and civil, that might be brought in said districts, and the same superintending control over commissioners' courts therein, the same authority in the judicial districts to issue writs of *habeas corpus*, &c., as by law vested in the judge of the United States court in the Indian Territory, or in the Circuit and District Courts of the United States. The judge of each district was authorized and empowered to hold court in any other district, for the trial of any case which the judge of such other district was disqualified from trying, and whenever on account of sickness, or for any other reason, the judge of any district was unable to perform the duties of his office, it was provided that either of the other judges might act in his stead in term time or vacation. All laws theretofore enacted conferring jurisdiction upon the United States courts held in Arkansas, Kansas and Texas, outside of the limits of the Indian Territory, as defined by law, as to offenses committed within the Territory, were repealed, and their jurisdiction conferred after September 1, 1896, on the "United States Court in the Indian Territory."

Section eleven of this act read as follows:

"SEC. 11. That the judges of said court shall constitute a court of appeals, to be presided over by the judge oldest in commission as chief justice of said court; and said court shall have such jurisdiction and powers in said Indian Territory and such general superintending control over the courts thereof as is conferred upon the Supreme Court of Arkansas over the courts thereof by the laws of said State, as provided by chapter forty of Mansfield's Digest of the Laws of Arkansas, and the provisions of said chapter, so far as they relate to the jurisdiction and powers of said Supreme Court of Arkansas as to appeals and writs of error, and as to the trial and decision of causes, so far as they are applicable, shall be, and they are hereby, extended over and put in force in the Indian Territory; and

appeals and writs of error from said court in said districts to said appellate court, in criminal cases, shall be prosecuted under the provisions of chapter forty-six of said Manfield's Digest, by this act put in force in the Indian Territory. But no one of said judges shall sit in said appellate court in the determination of any cause in which an appeal is prosecuted from the decision of any court over which he presided. In case of said presiding judge being absent, the judge next oldest in commission shall preside over said appellate court, and in such case two of said judges shall constitute a quorum. In all cases where the court is equally divided in opinion, the judgment of the court below shall stand affirmed.

"Writs of error and appeals from the final decisions of said appellate court shall be allowed, and may be taken to the Circuit Court of Appeals for the Eighth Judicial Circuit in the same manner and under the same regulations as appeals are taken from the Circuit Courts of the United States. Said appellate court shall appoint its own clerk, who shall hold his office at the pleasure of said court, and who shall receive a salary of one thousand two hundred dollars per annum. The marshal of the district wherein such appellate court shall be held shall be marshal of such court. Said appellate court shall be held at South McAlester, in the Choctaw Nation, and it shall hold two terms in each year, at such times and for such periods as may be fixed by the court."

The Indian Appropriation Act of June 10, 1896, (29 Stat. 321, 339, c. 398,) in respect of the proceedings therein referred to, provided that "if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the commission provided for in this act, it or he may appeal from said decision to the United States District Court: *Provided, however,* that the appeal shall be taken within sixty days, and the judgment of the court shall be final."

It has been ruled that the court thus described as the "United States District Court" was the United States Court in the Indian Territory. *Stephens* v. *Cherokee Nation,* 174 U. S. 477.

By the Indian Appropriation Act of June 7, 1897, c. 3, 30 Stat. 84, provision was made for the appointment of an additional judge for the United States court in the Indian Territory, who was to hold court at such places in the several judicial districts therein, and at such times, as the appellate court of the Territory might designate. This judge was to be a member of the appellate court and have all the authority, exercise all the powers, and perform the like duties as the other judges of the court, and it was "*Provided,* That no one of said judges shall sit in the hearing of any case in said appellate court which was decided by him."

By this act it was also provided:

"That on and after January first, eighteen hundred and ninety-eight, the United States courts in said Territory shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity thereafter instituted, and all criminal causes for the punishment of any offense committed after January first, eighteen hundred and ninety-eight, by any person in said Territory, and the United States commis-

sioners in said Territory shall have and exercise the powers and jurisdiction already conferred upon them by existing laws of the United States as respects all persons and property in said Territory; and the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes; and any citizen of any one of said tribes otherwise qualified who can speak and understand the English language may serve as a juror in any of said courts."

The Indian Appropriation Act of July 1, 1898, (30 Stat. 591, c. 545,) contained the following:

"Appeals shall be allowed from the United States courts in the Indian Territory direct to the Supreme Court of the United States to either party, in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands, in the Indian Territory, under the rules and regulations governing appeals to said court in other cases: *Provided*, That appeals in cases decided prior to this act must be perfected in one hundred and twenty days from its passage; and in cases decided subsequent thereto, within sixty days from final judgment; but in no such case shall the work of the commission to the Five Civilized Tribes be enjoined or suspended by any proceeding in, or order of, any court, or of any judge, until after final judgment in the Supreme Court of the United States. In case of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible."

In *Stephens* v. *Cherokee Nation*, 174 U. S. 445, it was held that the appeal thus granted was intended to extend only to the constitutionality or validity of the legislation affecting citizenship or allotment of land in the Indian Territory.

Thus it is seen that the act of March 1, 1895, created a Court of Appeals in the Indian Territory, with such superintending control over the courts in that Territory as the Supreme Court of Arkansas possessed over the courts of that State by the laws thereof; and the act also provided that "writs of error and appeals from the final decisions of said appellate court shall be allowed, and may be taken to the Circuit Court of Appeals for the Eighth Judicial Circuit in the same manner and under the same regulations as appeals are taken from the Circuit Courts of the United States," which necessarily deprived that court of jurisdiction of appeals from the Indian Territory trial court under section 13 of the act of 1891.

Prior to the act of 1895, the United States Court in the Indian Territory had no jurisdiction over capital cases, but by that act its jurisdiction was extended to embrace them, and we held in *Brown* v. *United States*, 171 U. S. 631, that this court had no jurisdiction over capital cases in that court, the appellate jurisdiction in such cases being vested in the appellate court of the Indian Territory.

In *Stephens* v. *Cherokee Nation*, we thought it unnecessary to determine whether the effect of the act of 1895 was to render the thirteenth section of the act of 1891 wholly inapplicable, as the judgments of the United States courts in the Indian Territory in the cases there considered were made final below by the act of 1896, and the appeals were regarded as having been in terms granted from those judgments by the act of 1898.

But this case is not affected by the act of 1898, and we are of opinion that it does not come within the thirteenth section of the act of 1891. In accordance with the legislation subsequent to 1891, the appeal should have been prosecuted to the Court of Appeals in the Indian Territory. The question whether or not an appeal would lie to this court from that court does not arise on this record.

Appeal dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.

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